Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MATTIE L. VAUGHN, M.D.,

Petitioner,

v.

THE STATE MEDICAL BOARD OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the revocation of a license to practice medicine, imposed by a state as disciplinary punishment in a disciplinary proceeding, subject to judicial review under the Eighth Amendment to the United States Constitution?

2. Does the Eighth Amendment to the United States Constitution apply to state disciplinary proceedings and punishments?

3. Does the Due Process Clause of Section I of the Fourteenth Amendment to the United States Constitution guarantee a doctor, who is a respondent in a disciplinary proceeding before a Sate Medical Board, the right of allocution to the Board prior to the imposition of a disciplinary sentence?

4. May a state, consistent with the fundamental fairness requirement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, discipline a doctor, and permanently revoke the doctor's license to practice medicine, where the state: (a) refuses to permit the doctor to present mitigating evidence prior to the imposition of punishment, and: (b) denies the doctor the opportunity to make a statement to the State Medical Board, after a remand, and before a sentence is determined or imposed?

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OCTOBER TERM, 1995

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v.

THE STATE MEDICAL BOARD OF OHIO,

Respondent.

Petition for A Writ of Certiorari to the Supreme Court of Ohio

---

The Petitioner, Mattie L. Vaughn, M.D., respectfully petitions for a writ of certiorari to review the judgment and order [entry] of the Supreme Court of Ohio entered in this case on April 24, 1996, from which reconsideration was denied on May 29, 1996.

OPINIONS BELOW

The Entry of the Supreme Court of Ohio, set forth in Appendix A, is not reported, but is referred to in *In re Vaughn* at 75 Ohio St. 3d 1449 (1996)[Douglas and Pfeiffer, J.J., dissenting]. The Opinion of the Court of Appeals of Ohio issued on November 30, 1995 is set forth in Appendix B, and is not officially reported. It is, however, unofficially reported at 1995 Ohio App. LEXIS 5258.

JURISDICTION OF THIS COURT

The Petitioner in this case seeks review of the judicial

determination "affirming" the permanent revocation by the State Medical Board of Ohio of her license to practice medicine in Ohio.

The Supreme Court of Ohio declined jurisdiction to hear the petitioner's appeal from the November 30, 1995 opinion and judgment of the Court of Appeals of Ohio which affirmed the Board's action on the basis that the appeal did not involve "any substantial constitutional questions." The Supreme Court made this determination despite the fact that the Court of Appeals held that:

1. The Board's revocation of a medical license is "**not subject to review under the Eighth Amendment**."

2. The imposition of a disciplinary punishment which "falls within the terms of a valid statute **cannot** amount to cruel and unusual punishment."

3. The Board's denial of Appellant's requests to be heard "and to present additional evidence in mitigation of sanction **did not violate appellant's right of due process** under the Ohio and United States Constitutions."

4. A physician "**has no cognizable due process interest** in having" the opportunity to present mitigating evidence to the Board or its hearing examiner prior to sentencing. (Emphasis Added).

The Supreme Court of Ohio entered its judgment on April

24, 1996 (a copy of which is attached as Appendix A). A timely filed motion for reconsideration was, thereafter, denied on May 29, 1996. A copy of the order [Reconsideration Entry] denying reconsideration appears herein at Appendix Q.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution states that:

> Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Section I of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny tc any person within its jurisdiction the equal protection of the laws.

The pertinent provisions of the Ohio Revised Code §§ 119.12 and 4731.22 are set forth in Appendices V and W herein.

---

[1] Under Rule XI of the Rules of Practice of the Supreme Court of Ohio (set forth herein at Appendix U), a "motion for reconsideration" is a "motion for rehearing" within the meaning of Rule 13.3 of this Court, and is treated as such by the Supreme Court of Ohio.

STATEMENT OF THE CASE

A. Petitioner Mattie L. Vaughn, M.D.

In this petition, Petitioner Mattie L. Vaughn, M.D., challenges the permanent revocation of her license to practice medicine in Ohio. The Petitioner is one of Ohio's very few African-American female physicians, was the valedictorian of her high school class, the President of her senior class at Wilberforce University, and received her medical degree from the University of Michigan in 1973.

She has practiced medicine, including pediatrics and prenatal care, for more than 20 years, primarily in the poor inner city areas of Columbus and Cincinnati, Ohio. Prior to the initiation of the disciplinary proceedings in question, she was Board-certified in general medicine, Board-eligible in obstetrics, and had never been the subject of a disciplinary proceeding or a malpractice suit.

In addition to her private practice, Dr. Vaughn served as a Major in the United States Army Reserve and as a medical missionary to the poor in Haiti (R. 103, Affidavit, at A-12).

B. Disciplinary Proceedings Below.

On September 29, 1986, the State Medical Board of Ohio, comprised of 12 members appointed by Ohio's Governor, issued to Dr. Vaughn a notice of opportunity for hearing, alleging that she had violated several provisions of Ohio Revised Code § 4731.22(B).

The Board alleged that Dr. Vaughn had allowed her nursing staff to operate her medical practice in her absence, by assessing, examining, and diagnosing patients for treatment of obesity. The Board also alleged that Dr. Vaughn prescribed Schedule II stimulants to diet patients without proper examination

and testing, and claimed that she directed her patients to two pharmacies from which she allegedly received value points which were redeemable for goods and services.

On November 21, 1986, the Board amended its notice to assert an additional allegation concerning the prescribing of controlled substances. Dr. Vaughn was indicted for the conduct alleged by the Board, but **all criminal charges were ultimately dismissed**.

On April 13, 1989, an administrative hearing was held before a Board Hearing Officer. **Dr. Vaughn was not represented by counsel** at this hearing. Board Minutes Exhibit D at A-7. On February 2, 1990, the Hearing Officer issued a report recommending that the Board permanently revoke Dr. Vaughn's certificate to practice medicine and surgery. Dr. Vaughn then filed objections to the report and recommendation.

On March 14, 1990, the Board voted to affirm the Hearing Officer's recommendation and to **permanently revoke** Dr. Vaughn's certificate to practice medicine (R. 89, Brief Exhibit C, Order of Board at A-4). The Board found that Dr. Vaughn had violated:

1. **R.C. § 4731.22(B)(1)** -- Permitting one's name or one's certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given;

2. **R.C. § 4731.22(B)(2)** -- Failure to use reasonable care and discrimination in the administration of drugs . . .;

3. **R.C. § 4731(B)(3)** -- Selling,

> prescribing, giving away or administering drugs for other than legal and legitimate therapeutic purpose . . .;
>
> 4. **R.C. § 4731.22(B)(4)** -- The receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business;
>
> 5. **R.C. § 4731.22(B)(6)** -- A departure from, or the failure to conform to, minimum standards of care of similar practitioner under the same or similar circumstances, whether or not actual injury to a patient is established;
>
> 6. **R.C. § 4731.22(B)(16)** (as in effect prior to March 17, 1987) -- Violating or attempting to violate, directly, or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the Board, to wit, R.C. 4731.41, Practice of Medicine or Surgery Without Certificate. Id.

C. State Appellate Proceedings.

Dr. Vaughn appealed the Board's order to the Franklin County Court of Common Pleas, which on August 15, 1990, affirmed the Board's order, finding that she violated R.C. § 4731.22(B)(2), (4), (6) and (16), but **reversed** that portion of the

order finding that Dr. Vaughn had violated R.C. § 4731.22(B)(1) and (3) (R. 26, Decision, at 5).

In an amended decision filed on September 7, 1990, the Court remanded the issue to the Board and ordered that a new review be conducted regarding the appropriate discipline to be imposed upon Dr. Vaughn (R. 31, Amended Decision, at 1). On September 25, 1990, the Court issued a judgment entry which affirmed in part and reversed in part the Board's order revoking appellant's certificate to practice and remanded the matter to the Board for a disciplinary finding consistent with its decisions (R. 33, Judgment Entry, at 2-3).

Dr. Vaughn appealed to the Court of Appeals of Ohio for the Tenth District from that portion of the September 25, 1990 judgment which affirmed the Board's finding that Dr. Vaughn had violated R.C. § 4731.22(B)(4) (R. 35, Notice of Appeal, and R. 37, Court of Appeals Docketing Statement). The Medical Board also filed a cross-appeal (R. 40, Notice of Cross Appeal, and R. 41, Docketing Statement).

On August 6, 1991, the Court of Appeals rendered an opinion finding that "the trial court abused its discretion in concluding that the Board's decision finding that appellant (Dr. Vaughn) had violated R.C. § 4731.22(B)(4) was supported by reliable, probative, and substantial evidence" and also found that the **trial court erred in failing to consider certain evidence** (R. 43, Opinion of the Court of Appeals at 11, 14). Accordingly, the Court of Appeals reversed the judgment of the Common Pleas Court and remanded the matter for further proceedings by entry dated August 12, 1991 (R. 44, Journal Entry).

On February 19, 1992, the Common Pleas Court, considering the matter on remand from the Court of Appeals, upheld the Board's determination that Dr. Vaughn violated R.C. §§ 4731.22(B)(1), (2), (3), (6) and (16), but held that the Board's conclusion that she violated R.C. § 4731,22(B)(4) was not

supported by reliable, probative, and substantial evidence (R. 52, Decision).

By judgment entry dated March 25, 1992, the Common Pleas Court remanded the matter "to the Board for a disciplinary hearing and/or a finding consistent with this order and the Appellate Court's [August 6, 1991] decision." (R. 52).

On August 10, 1993, Dr. Vaughn, through her then counsel, Thomas L. Henderson, filed a motion with the Board requesting "that this matter be remanded to a hearing officer for the purpose of presenting new and mitigating evidence." (R. 89, Brief, Exhibit E Motion for Remand, at A-15). Dr. Vaughn's "Memorandum In Support" of the motion stated, in pertinent part, that:

> Dr. Vaughn respectfully requests that this Board, pursuant to the Court of Common Pleas' Judgment Entry, permit Dr. Vaughn an opportunity to present new and mitigating evidence **which the movant believes is relevant and necessary for the Board to make an informed and fair decision.** . . . Id. at A-16 [emphasis added].

The Board's counsel, Assistant Attorney General Anne C. Berry, advised the Board that **she did not have a problem with remanding it** "for the purpose of hearing mitigating evidence" and that "**at least one court has informed the Board that it should take such evidence under consideration.**" Id. Exhibit D, Board Minutes at A-7-8.

The minutes of the Board meeting (Appendix X herein) reflect, at page 3, that:

> Ms. Berry stated that she had discussed this matter at length with Mr. Henderson over the last few days, and she doesn't have a problem with the Board's remanding it for the purpose of hearing

> mitigating evidence as to changes Dr. Vaughn has made in her practice. Ms. Berry noted that Dr. Vaughn has continued to practice during court-ordered stays of the Board's revocation order. She was Board Certified in general medicine, and Board eligible in Obstetrics and Gynecology. **She noted that in recent cases at least one court has informed the Board that it should take such evidence under consideration.** Ms. Berry commented that the Board has appealed that decision, and the circumstances are not precisely the same as those in Dr. Vaughn's case, but in the interim she doesn't have a problem with hearing evidence offered in mitigation in the hearing setting. (R. 89, Brief, Exhibit D, Board Minutes at A-7-8).

A Board meeting was held on August 11, 1993, at which time the Board considered Dr. Vaughn's motion. As noted in the minutes of the meeting, Dr. Vaughn's counsel pointed out the importance of holding a mitigation hearing:

> Mr. Henderson stated that, specifically, this matter commenced in 1986 with the Board's citation letter to Dr. Vaughn. It is important for the Board to be aware of Dr. Vaughn's activities subsequent to the charge letter of 1986, as well as before 1986. For example, **there are fewer violations before the Board now**, pursuant to the Court's decision. In light of the fact that there are fewer violations before the Board -- specifically the Court of Appeals having determined that Dr. Vaughn did not receive a thing of value for referring patients to particular pharmacists -- **it may be important to consider certain mitigating factors such as Dr. Vaughn's conduct subsequent to the violations.**

> Mr. Henderson added that it is also important to note that **at the original proceeding Dr. Vaughn was not represented by counsel.** . . .
>
> In the most recent Judgment Entry remanding this matter back to the Board, Judge Reece states that he's remanding it back for disciplinary hearing and/or a finding consistent with the Court's Order and the Appellate Court's decision. **Mr. Henderson stated that he believes that the Judge contemplated something more than a cursory review of the very cold and very old record.** This was contemplated not only by the trial court, but also by the Court of Appeals, both of which entered lengthy opinions. Mr. Henderson stated that **demonstrated ability to practice without incident for a period of years in a clinical practice where the doctor sees 40 to 50 patients per day is of some significance** and relevance to the Board's making a fair disciplinary determination. Id. at A-7 [emphasis added].

The Board, nevertheless, unanimously refused to grant Dr. Vaughn's request for a hearing to review mitigating facts and circumstances which had transpired from the time of the Hearing Examiner's report on February 2, 1990 until the Board hearing on August 11, 1993. Id. at A-10. The Board also refused to hear any other matters even though **seven years had elapsed since the incident had occurred, and four years had elapsed since the hearing officer had conducted the administrative hearing**. (Id. at A-11).

During the Board's August 11, 1993 meeting, Dr. Vaughn requested an opportunity "to make a statement to the Board." Her request was also denied, as a Board member indicated that it would be "out of line." (R. 89, Brief, Exh. D, Board Minutes at A-11) See page 6 of the Minutes at Appendix X.

During its August 11, 1993 meeting, the Board again voted (by a vote of 6 to 2) to adopt an order to **permanently revoke** Dr. Vaughn's certificate to practice medicine in the State of Ohio (Id. at A-14). The Board took this drastic action:

- Without remanding the matter to the Board's hearing officer for the presentation of mitigating evidence (Id. at A-10);

- Without permitting Dr. Vaughn to make a statement to the Board (Id. at A-11);

- Without **considering** any mitigating evidence, and specifically, Dr. Vaughn's exemplary practice subsequent to the violations of R.C. § 4731.22(B) in question (Id. at A-10);

- Despite the fact that the Court of Appeals had vacated the Board's finding that Dr. Vaughn violated 4731.22(B)(4), a finding upon which the Board's 1990 revocation order had been based (Id. at A-13);

- Despite the fact that a review of the records of 1,000 of Dr. Vaughn's patients by the Board's expert witness found that Dr. Vaughn's conduct **did not cause any patient harm**. (Id. at A-13); and,

- Despite the fact that the permanent revocation of Dr. Vaughn's certificate to practice medicine was **much more severe** than the punishment imposed by the Board upon other physicians who, unlike Dr. Vaughn, actually **caused harm** to patients, or engaged in more egregious misconduct.

(Id. at A-13).

The Board's disparate and excessive punishment of Dr. Vaughn was recognized by the Board's only female member. Id. According to the Board minutes of August 11, 1993:

> Ms. Noble [a Board member] stated that the Board has seen other cases where revocation is in the guidelines but the Board didn't permanently revoke the license. Those physicians are presently practicing medicine with the Board's sanction. She stated that **the Board really needs to look at the manner in which it issues permanent revocations** and the types of cases in which the Board does not issue a permanent revocation. * * * Id.
>
> She stated that **the Board had seen cases where drugs were given to individuals who were known addicts, yet those doctors' licenses weren't permanently revoked.** She stated that **it is much worse to give drugs to someone addicted than to allow a licensed practical nurse to give out these types of prescriptions.** Ms. Nobel added that **the Board has also seen physicians with psychological problems who have caused detrimental, irrevocable problems for patients and the Board has not revoked their licenses**. The Board needs to weigh cases such as the one under consideration to see if the physician is retainable. She does not see how the Board can say that Dr. Vaughn's license needs to be permanently revoked when it has not revoked in other cases involving much worse behavior. Id. (Emphasis added).

On August 13, 1993, the Board issued an Order and Entry which ordered the permanent revocation of Dr. Vaughn's

certificate to practice medicine (R. 89, Brief, Exh. C, Order of Medical Board at A-5).

On September 3, 1993, Dr. Vaughn filed a Notice of Appeal to the Common Pleas Court, pursuant to R.C. § 119.12, from the Board's August 13, 1993 order which was mailed to Dr. Vaughn on August 26, 1993 (R. 70, Notice of Appeal). On September 3, 1993, Dr. Vaughn also filed a motion with the Court for an order suspending the August 13, 1993 order of the Board (R. 71, Motion to Suspend Order of Board). On September 20, 1993, Dr. Vaughn filed a motion with the Court requesting a stay of the revocation of her medical license pending her appeal (R. 77, Motion to Continue and Stay Revocation), which was granted by entry dated December 27, 1993 (R. 87, Entry).

In her appeal to the Common Pleas Court, Dr. Vaughn argued, among other things, that:

1. The Board's proceedings and action violated her right to due process of law guaranteed by the Fourteenth Amendment to the U.S. Constitution; and that specifically:

    a. The Board's refusal to hear or permit Dr. Vaughn to present mitigating evidence denied her due process of law.

    b. The Board's refusal to allow Dr. Vaughn to testify or make a statement on her own behalf also denied her due process of law.

    c. The Board's permanent revocation of Dr. Vaughn's license to practice

> medicine without considering mitigating evidence and giving Dr. Vaughn an opportunity to speak on her own behalf is so fundamentally unfair as to violate her right to due process.

2. The Board's imposition of the harsh sanction of permanent revocation of Dr. Vaughn's certificate to practice medicine was not in accordance with law and violated the prohibition against excessive and cruel and unusual punishment as guaranteed by the Eight Amendment to the U.S. Constitution and Article 1, Section 9 of the Ohio Constitution.

On March 21, 1995, the Common Pleas Court filed its decision affirming the Board's order which revoked Dr. Vaughn's license (R. 100, Dec. at 8). The Court noted, at pages 3-4 of its decision that:

> The issue before the Court is not whether the Board's finding that Appellant's violation of . . . [R.C. 4731.22 (B)(1), (2), (3), (6) and (16)] is supported by reliable, probative, and substantial evidence; but **whether Appellant's various rights were violated by the Board and whether the permanent revocation of Appellant's license was appropriate in light of the violations . . . .**
>
> * * *
>
> Appellant claims that by failing to admit additional mitigating evidence and by refusing to allow Appellant to give a statement to the Board, Appellant's right to due process and equal protection were violated; the penalty was excessive under the circumstances; and the board failed to

> comply with the remand order of the Court. (Id. at 3-4).
>
> The penalty imposed is within the scope of authority granted to the Board, [and] this Court cannot reverse, vacate or modify it. (Id. at 5-7, emphasis added).

The Court **did not address or rule upon** Dr. Vaughn's contention that the Board's permanent revocation of her medical license violated her rights guaranteed by the Eighth Amendment prohibiting excessive and cruel and unusual punishment. Id.

On March 30, 1995, Dr. Vaughn filed a motion for reconsideration of the Court's decision (R. 101, Motion for Reconsideration), which pointed out that the Court's decision did not address or rule upon her contention that the penalty imposed upon her was unconstitutional under the circumstances of the case (Id. at 4).

On April 7, 1995, Dr. Vaughn also filed an application for an order continuing the stay of revocation of her license pending the determination of her motion for reconsideration, the determination and final adjudication of her appeal from the order of the Board dated August 13, 1993, the decision of the Common Pleas Court filed March 21, 1995, and an Entry affirming the Board's order (R. 103, App. for Order Continuing Stay of the Board). The motion was overruled on May 11, 1995 (R. 112, Judgment Entry).

On May 24, 1995, the Common Pleas Court filed an entry affirming the Board's order, and Dr. Vaughn appealed to Ohio's Tenth District Court of Appeals. Dr. Vaughn presented eight assignments of error, again raising the constitutional arguments previously mentioned.

On November 30, 1995, the Court of Appeals affirmed the Common Pleas Court and, among other things, erroneously held

that:

1. A physician "**has no cognizable due process interest** in having" the opportunity to present mitigating evidence to the Board or its hearing examiner prior to sentencing [Opinion, p. 5011].

2. The Board's denial of Appellant's requests to be heard "and to present additional evidence in mitigation of sanction **did not violate appellant's right of due process** under the Ohio and United States Constitutions." [Opinion, p. 5013].

3. The Board's revocation of a medical license is "**not subject to review under the Eighth Amendment**" and Article 1, Section 9 of the Ohio Constitution [Opinion, p. 5014].

4. The imposition of disciplinary punishment which "falls within the terms of a valid statute **cannot** amount to cruel and unusual punishment" [Opinion, p. 5014] [Emphasis Added].

On January 16, 1996, Dr. Vaughn appealed to the Supreme Court of Ohio from the November 30, 1995 Opinion and judgment of the Court of Appeals. On April 24, 1996 however, that Court issued an Entry declining jurisdiction to hear the case. See *In re Vaughn*, 75 Ohio St. 3d 1449 (1996) [Douglas and Pfeiffer, J.J. dissenting]. The Court's Entry stated:

> Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial

constitutional question.

On May 6, 1996, Appellant filed a motion for reconsideration which was denied by Reconsideration Entry dated May 29, 1996. Accordingly, a petition for certiorari became necessary. As noted by Stern, Gressman and Shapiro in SUPREME COURT PRACTICE (Washington, D.C. 1993) at page 326, n. 69:

> Where, **as in Ohio**, the supreme or highest court of a state dismisses an appeal of right for want of a substantial constitutional question, **that court would appear to be deciding the appeal on its merits and would thus be the court to which the petition for certiorari or appeal should be directed**. [Emphasis Added].

REASONS FOR GRANTING THE PETITION

This case presents a timely opportunity to provide guidance to state courts and administrative boards who are misapplying Constitutional standards in the context of quasi-criminal disciplinary proceedings against licensed professionals. In the present case, the Ohio Supreme Court declined to vacate a determination by the Court of Appeals of Ohio that the revocation of a medical license as disciplinary punishment is "not subject to review under the Eighth Amendment" and that the Eighth Amendment "generally applies only to criminal prosecutions and punishments".

The case, consequently, raises important questions concerning the administration of justice in state disciplinary cases. If an abuse of the power to punish, in a disciplinary proceeding, by a state which deprives a license holder of a liberty and/or property interest is "**not subject to review under the Eighth Amendment**", then an important part of the Bill of Rights has essentially been eliminated. "**To take away all remedy for the enforcement of a right is to take away the right itself.**"

Virginia Coupon Cases, 114 U.S. 269, 303 (1855).

The Court's decision is plainly and shockingly wrong, and allowing it to stand could have serious consequences for thousands of doctors and medical professionals throughout this Country.

The due process issues raised by this case are also important. Indeed, the issue of whether a respondent in a disciplinary proceeding has a right to allocution under the fundamental fairness requirement of the Due Process Clause of the Fourteenth Amendment appears to be an issue of first impression for this Court.

A. The Questions Presented Are Substantial.

More than 200 years after the adoption of the Eighth Amendment which applies against the state by virtue of the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660 (1962), the scope of its application and protection in state disciplinary proceedings involving licensed professionals is still disputed and uncertain.

Despite the fact that this Court has determined such proceedings to be quasi-criminal, *In re Ruffalo*, 390 U.S. 544, 551 (1968), and the fact that the Eighth Amendment has even been held applicable to certain civil proceedings, *Dep't of Revenue v. Kurth Ranch*, 114 S.Ct. 1937 (1994); *Alexander v. United States*, 113 S.Ct. 2766 (1993); *Ingraham v. Wright*, 430 U.S. 651, 688, n.4 (1977); *Austin v. United States*, 113 S.Ct. 2801 (1993); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966), the State of Ohio still contends that the Amendment is not applicable to disciplinary proceedings by the State Medical Board of Ohio.

1. This Petition Presents Important Questions Under the Eighth Amendment.

This case is an appropriate one to revoke this uncertainty because it squarely presents a number of unanswered Eighth Amendment questions:

- Does the Eighth Amendment apply to state disciplinary proceedings and punishments?

- Is the revocation of a license to practice medicine, imposed by a state as disciplinary punishment for professional misconduct, subject to judicial review under the Eighth Amendment?

Each of these questions is substantial in its own right, particularly for the thousands of professionals, such as doctors and lawyers, throughout this country, and their patients and clients who rely on their services.

For many of the professionals, their state license to practice their chosen calling is their most valuable possession. See, e.g., *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824) (noting that the prosperity of a professional's "whole life may depend" upon the exercise of the profession). *See also, Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). The permanent revocation of that license constitutes a severe punishment -- the "professional equivalent" of the death penalty. As the Massachusetts Supreme Court properly noted in *Commonwealth v. Yameen*, 401 Mass. 331, 516 N.E.2d 149, 151 (1987):

> . . . A licensee whose license has been revoked or suspended immediately suffers the irreparable penalty of loss of [license] for which there is no practical compensation . . .

2. This Petition Also Presents Important Questions Under the Due Process Clause of the Fourteenth Amendment.

This case also squarely presents important questions concerning the scope of the fundamental fairness doctrine recognized under the Due Process Clause of Section 1 of the Fourteenth Amendment, specifically:

- Whether the Due Process Clause of Section 1 of the Fourteenth Amendment guarantees a respondent in disciplinary proceedings before a State Medical Board, the right of allocution before the Board imposes a disciplinary sentence? and;

- Whether a state can constitutionally revoke a license to practice medicine when it refuses to allow the respondent doctor to present mitigating evidence or make a statement before the sentence is determined or imposed?

In the present case, Dr. Vaughn was denied the right of allocution, an ancient right recognized by the common law, designed to temper punishment with mercy and ensure that sentencing reflects individualized circumstances. See 4 WILLIAM BLACKSTONE, *Commentaries*, at 375; *United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991).

The right of allocution is an important right carefully guarded by courts for more than 300 years. "As early as 1689, the common law acknowledged that a court's failure to invite a defendant to speak before sentencing **required** reversal." *United States v. Alba Pagan*, 33 F.3d 125, 129-30 (1st Cir. 1994) citing *Barnes*, 948 F.2d at 328 citing *Anonymous*, 87 Eng. Rep. 175 (K.B. 1889); *see also Green v. United States*, 365 U.S. 301,

304 (1961)[emphasis added].

The right of allocution is implicit in the concept of fundamental fairness and is not limited merely to sentencing in criminal cases. As recognized in a parole revocation case:

> **[w]e hold that allocution is a right guaranteed by the due process clause of the Constitution.** *United States v. Carper*, 24 F.3d 1157 (9th Cir. 1994) quoting *Boardman v. Estelle*, 957 F.2d 1523, 1529-30 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 297 (1992)[emphasis added].

The right is applicable not only in criminal proceedings, but also in administrative proceedings. The Securities and Exchange Commission allows a limited right of allocution. Harvey L. Pitt, REPORT OF THE TASK FORCE ON SEC SETTLEMENTS OF THE SUBCOMMITTEE ON CIVIL LITIGATION AND SEC ENFORCEMENT MATTERS OF THE FEDERAL SECURITIES LAW COMMITTEE OF THE AMERICAN BAR ASSOCIATION SECTION OF BUSINESS LAW, 1992, at n. 63 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5138).

The petitioner contends that the right of allocution is applicable to state disciplinary proceedings since all such proceedings should reflect "the notion, deeply rooted in the common law, that justice must satisfy the appearance of justice." *In re Grand Jury Proceedings Involving Eve Rosahn*, 671 F.2d 690, 696 (2d Cir. 1982) quoting *Levine v. United States*, 362 U.S. 610, 616 (1960). In the present case, however, the Board failed to afford Dr. Vaughn her right of allocution guaranteed by the Due Process Clause. Her statement to the board would have taken only a few minutes, but probably would have had a significant impact on the severity of the disciplinary sentence imposed.

The State Medical Board of Ohio voted **6-2** to revoke Dr. Vaughn's license. R.C. 4731.22 (B) requires that at least six

members of the Board must vote for permanent revocation in order for the punishment to be imposed. Consequently, **one vote would have made a difference**.

This case presents an opportunity for this Court to clarify the scope of the right of allocution guaranteed by the Due Process Clause of the Fourteenth Amendment.

Fundamental fairness is at the heart of the Due Process Clause of the Fourteenth Amendment. See, e.g., *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 24-25 (1981); *Lisenba v. California*, 314 U.S. 219, 236 (1942). Indeed, as this Court properly noted in *Malinsky v. New York*, 324 U.S. 401 (1945):

> Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon **the whole course of the proceedings** in order to ascertain whether they **offend those canons of decency and fairness which express the notions of justice . . . .**

Moreover, "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, due process guarantees must be scrupulously observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). These constitutional guarantees are applicable to disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544, 550 (1968).

In the present case, however, the **"due process guarantees" were clearly not followed by the State Medical Board, much less "scrupulously observed."** Unfortunately, this is not surprising. As Justice Pfeiffer of the Ohio Supreme Court observed in his concurring opinion in *State Medical Board v. Murray*, 66 Ohio St. 3d 527, 538 (1993):

> [d]uring my short tenure on this Court, I have seen repeated occasions where the State Medical

> Board has attempted to provide accused doctors with as little due process as possible . . . . Id. (Pfeiffer, J., concurring).

In the present case, in the 1993 proceedings before the State Medical Board of Ohio, Dr. Vaughn was denied the opportunity to present evidence on the reform in her practice procedures over the **seven year period** between 1986, (when the Board initiated the disciplinary proceedings) and August 11, 1993, (when the Board voted to revoke her license). The Board was without the benefit of this vital evidence when it determined that her **punishment** should be the **permanent revocation** of her license to practice medicine.

Clarification by this Court of the fundamental fairness requirement of the Due Process Clause as it pertains to permitting the introduction of mitigating information prior to sentencing after a long delay in the proceedings, is important to the proper administration of justice in state disciplinary proceedings.

B. The Decision of the Supreme Court of Ohio is Erroneous.

The Court should grant the petitioner's petition not only because novel and important issues of law are presented in this case, but also because the decision of the Supreme Court of Ohio (and that of the Court of Appeals of Ohio which it left stand) is erroneous. This case clearly involves a "substantial constitutional question" of federal law.

Moreover, the Court of Appeals' determination below that disciplinary punishment is not subject to Eighth Amendment review is clearly incorrect and conflicts with relevant case law of this Court. As this Court recently recognized, "[b]oth the Eighth Amendment and § 10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent the government from abusing its power to punish . . ." *Austin v. United States*, 113

S.Ct. 2801, 2804 (1993) citing *Browning-Ferris Industs. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67 (1989)(O'Connor, J., concurring).

"The notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law." Id. at 2805 quoting *United States v. Halper*, 490 U.S. 435, 447-48 (1989). Therefore, any sanction that serves either "retributive or deterrent purposes, is punishment, as we have come to understand the term." Id. at 2806 quoting *Halper*, 490 U.S. at 448. As a result, the Eighth Amendment is applicable to disciplinary punishment.

From the State Medical Board's perspective, permanent revocation of Dr. Vaughn's medical license serves both a retributive and deterrent purpose. The State Medical Board is punishing Dr. Vaughn for her past behavior. By publishing records of its proceedings, in two official publications, YOUR REPORT FROM THE STATE MEDICAL BOARD OF OHIO, AND FORMAL ACTION MAILING LIST, the Board also apparently hopes to deter other doctors from engaging in prohibited conduct.

The determination by the Court of Appeals of Ohio below that "a sentence that falls within the terms of a valid statute cannot amount to cruel and unusual punishment" is also incorrect. As this Supreme Court has properly recognized, even if authorized by statute, "no penalty is per se constitutional." *Solem v. Helm*, 463 U.S. 277, 290 (1983).

In the past, this Court has granted certiorari to correct erroneous decisions. See, e.g., *Chicago v. N.W. Tr. Co. & Kalo Brick & Tile Co*, 450 U.S. 311 (1981); *Williams v. Lee*, 358 U.S. 217, 218 (1959); *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136 (1968); *New York Transit Authority v. Beazer*, 440 U.S. 568, 571 (1979). It should again do so in this case, particularly in view of the past record of questionable conduct by the State Medical Board of Ohio which led one

Justice of the Supreme Court of Ohio in *Pons v. State Medical Board*, 66 Ohio St. 3d 619, 624 (1993), to call the Board "**the proverbial eight-hundred pound gorilla that it has become**". A failure by this Court to hear this case and to address the important constitutional issues involved may well result in future violations of the Federal constitutional rights of physicians and other Ohioans.

This Court has historically served as "guardian" of the rights (including the right to be free from excessive and cruel and unusual punishment) incorporated into the Bill of Rights. As James Madison wrote more than 200 years ago:

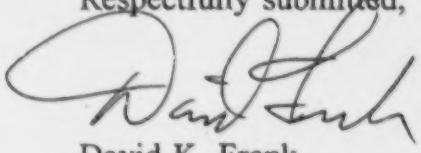
> If they [the amendments in the Bill of Rights] are incorporated into the Constitution, **independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights**; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; **they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.** ANNALS OF CONGRESS 457 (Joseph Gales ed. 1789)[emphasis added].

This Court should once again exercise its role as guardian of the Constitutional rights at issue, and hear this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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August 26, 1996

APPENDIX A

The Supreme Court of Ohio

Filed
April 24, 1996
Marcia J. Mengel, Clerk
Supreme Court of Ohio

1996 Term

In the Matter of	:	
Mattie L. Vaughn,	:	
M.D.,	:	
Appellant,	:	Case No. 96-117
	:	
v.	:	
	:	
The State Medical	:	ENTRY
Board of Ohio,	:	
Appellee	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Michael F. Colley Co., L.P.A.

(Franklin county Court of Appeals; No. 95APE05645)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

0035r042496

APPENDIX B

In the Matter of Mattie L. Vaughn, M.D.,
Appellant-Appellant,
vs.
The State Medical Board of Ohio, Appellee-Appellee.

No. 95APE05-645

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1995 Ohio App. LEXIS 5258

November 30, 1995, Rendered On

APPEAL from the Franklin County Court of Common Pleas.

COUNSEL

Michael F. Colley Co., L.P.A., Michael F. Colley and David K. Frank, for appellant.

Betty D. Montgomery, Attorney General, and Anne Berry Strait, for appellee.

JUDGES

LAZARUS, J., BOWMAN, P.J., and PETREE, J., concur.

AUTHOR: LAZARUS

OPINION

(REGULAR CALENDAR)

LAZARUS, J.

Appellant, Mattie L. Vaughn, M.D., appeals from a judgment of the Franklin County Court of Common Pleas affirming revocation of her medical license by appellee, State Medical Board of Ohio. We affirm for the reasons that follow.

The medical board began its investigation of appellant's medical practice in 1986. The practice largely consisted of weight-loss patients. Based on a hearing examiner's report of February 2, 1990, the board voted on March 14, 1990, to permanently revoke appellant's certificate to practice medicine and surgery. The board found violations of six subsections of R.C. 4731.22(B): subsections (1), (2), (3), (4), and (6), and former subsection (16). Appellant appealed to the court of common pleas, which affirmed as to subsections (2), (4), (6), and (16) but reversed as to subsections (1) and (3). Both parties appealed to this court, which upheld the board's findings as to subsections (2), (3), (6), and (16) but reversed the judgment of the board and the court of common pleas as to subsection (4). The board did not appeal the court's reversal as to subsection (1). See Vaughn v. State Medical Bd. (Aug. 6, 1991), 1991 Ohio App. LEXIS 3796, Franklin App. No. 90AP-1160, unreported (1991 Opinions 3735), motion to certify the record overruled, 62 Ohio St. 3d 1496. The four violations that were upheld were: (1) failure to use reasonable care discrimination in the administration of drugs or failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease, in violation of R.C. 4731.22(B)(2); (2) prescribing drugs for other than legitimate therapeutic purposes, in violation of R.C. 4731.22(B)(3); (3) departing from or failing to conform to minimal standards of care of similar practitioners under the same or similar circumstances, in violation of R.C. 4731.22(B)(6)(a); and (4) assisting in the unauthorized practice of medicine, in violation of former R.C. 4731.22(A)(16) and R.C. 4731.41.

On remand, the court of common pleas,on March 25, 1992, remanded the case "to the Board for a disciplinary hearing and/or a finding consistent with this Order and the Appellate Court's

decision." On August 10, 1993, appellant filed a motion with the board for remand to a hearing examiner so she could present evidence in mitigation of sanction. The next day, the board unanimously voted to deny appellant's motion for remand to a hearing examiner and voted 6-2 to revoke appellant's certificate.

Appellant filed a notice of appeal and a motion for stay of revocation with the court of common pleas. The court granted the stay on December 27, 1993, but affirmed the revocation of appellant's certificate on March 21, 1995. Appellant then filed motions for an extension of the stay of revocation and for reconsideration of the court's decision to affirm the revocation. The court denied both motions on May 11, 1995.

Appellant filed a notice of appeal with this court on May 24, 1995, and, on August 25, 1995, this court granted appellant's motion for stay of execution of revocation pending appeal. Appellant now asserts the following eight assignments of error:

1. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN AFFIRMING THE AUGUST 13, 1993 ORDER AND ENTRY OF THE STATE MEDICAL BOARD OF OHIO, SINCE THAT ORDER IS NOT 'IN ACCORDANCE WITH LAW' AND THE MEDICAL BOARD'S PROCEEDINGS AND ACTION OF AUGUST 1993 VIOLATED DR. VAUGHN'S RIGHT TO DUE COURSE OF LAW AND DUE PROCESS OF LAW GUARANTEED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

2. "THE TRIAL COURT ERRED, OR ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN AFFIRMING THE AUGUST 13, 1993 ORDER AND ENTRY OF THE STATE MEDICAL BOARD, SINCE THAT ORDER IS NOT 'IN ACCORDANCE WITH LAW' AND THE PENALTY OF PERMANENT REVOCATION OF THE

APPELLANT'S CERTIFICATE TO PRACTICE MEDICINE, IMPOSED BY THAT ORDER, IS IMPROPER, UNLAWFUL, EXCESSIVE AND UNCONSTITUTIONAL."

3. "THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN AFFIRMING THE AUGUST 13, 1993 ORDER AND ENTRY OF THE STATE MEDICAL BOARD OF OHIO SINCE THE BOARD'S ORDER AND ENTRY OF AUGUST 13, 1993, IS NOT 'IN ACCORDANCE WITH LAW' AND THE BOARD DID NOT COMPLY WITH THE MARCH 25, 1992 REMAND ORDER OF THE COURT OF COMMON PLEAS."

4. "THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN OVERRULING HER AMENDED APPLICATION FOR AN ORDER CONTINUING THE STAY OF REVOCATION OF HER CERTIFICATE TO PRACTICE MEDICINE, SINCE THE PROVISION OF R.C. ^U 119.12, WHICH IMPOSES A FIFTEEN MONTH LIMITATION ON A JUDICIAL STAY ORDER AND VIOLATES THE SEPARATION OF POWERS DOCTRINE RECOGNIZED IN OHIO AND IS, THEREFORE, UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE APPELLANT."

5. "THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN OVERRULING HER AMENDED APPLICATION FOR AN ORDER CONTINUING THE STAY OF REVOCATION OF HER CERTIFICATE TO PRACTICE MEDICINE SINCE PARAGRAPH 8 OF R.C. ^U 119.12, UPON WHICH THE COURT RELIED, AS APPLIED TO DR. VAUGHN, VIOLATES HER RIGHT TO DUE PROCESS OF LAW, GUARANTEED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION, AND SECTION 1 OF THE FOURTEENTH

AMENDMENT TO THE UNITED STATES CONSTITUTION."

6. "THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN OVERRULING HER AMENDED APPLICATION FOR AN ORDER CONTINUING THE STAY OF REVOCATION OF HER CERTIFICATE TO PRACTICE MEDICINE SINCE PARAGRAPH 8 OF R.C. ^U 119.12, UPON WHICH THE COURT RELIED, APPLIED TO DR. VAUGHN, VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND EXCESSIVE FINES, GUARANTEED BY ARTICLE I, SECTION 9. OF THE OHIO CONSTITUTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

7. "THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN OVERRULING HER AMENDED APPLICATION FOR AN ORDER CONTINUING THE STAY OF REVOCATION OF HER CERTIFICATE TO PRACTICE MEDICINE SINCE PARAGRAPH 8 OF R.C. ^U 119.12, UPON WHICH THE COURT RELIED, AS APPLIED TO DR. VAUGHN, VIOLATES HER CONSTITUTIONAL RIGHT TO THE EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION."

8. "THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN OVERRULING HER AMENDED APPLICATION FOR AN ORDER CONTINUING THE STAY OF REVOCATION OF HER CERTIFICATE TO PRACTICE MEDICINE SINCE PARAGRAPH 8 OF R.C. ^U 119.12, UPON WHICH THE COURT RELIED, AS APPLIED TO DR. VAUGHN, VIOLATES HER CONSTITUTIONAL RIGHTS TO JUSTICE AND A REMEDY GUARANTEED BY ARTICLE I, SECTION 16 OF

THE OHIO CONSTITUTION."

In her first assignment of error, appellant asserts that she was deprived of her right to due process under the Ohio and United States Constitutions by the board's denial at the August 11, 1993 meeting of her request to testify and to present additional evidence in mitigation of sanction.

To be consistent with the Due Process Clause, deprivation of a right, including revocation of a professional license, must be preceded by notice and a hearing. Determining the type of hearing that minimally comports with due process requires a balancing of the governmental and individual interests at stake. Korn v. Ohio State Medical Bd. (1988), 61 Ohio App. 3d 677, 684, 573 N.E.2d 1100. Ohio's Due Course Clause, Section 16, Article I, Ohio Constitution is equivalent to the Due Process Clause of the Fourteenth Amendment. Sorrell v. Thevenir (1994), 69 Ohio St. 3d 415, 422, 633 N.E.2d 504.

In cases involving the revocation of a certificate to practice medicine, generally the interests are great: the state's interest in protecting the public and the physician's interest in maintaining a livelihood. This appeal, however, involves the narrower question of what due process must be afforded a physician when guilt has already been adjudged and only the issue of sanction remains before the board.

We find that, under these circumstances, a physician has no cognizable due process interest in having another opportunity to be heard. All of the evidence appellant now proffers is evidence of her conduct since the hearing examiner's 1990 report. Appellant claims that she has reformed her medical practice, that she cooperated in the board's investigation, that her transgressions did not cause any documented harm to patients, and that she now provides excellent medical care. Appellant's opportunities to be heard included the hearing before the hearing examiner, written objections to the hearing examiner's report, and motions before the board. See Ohio Adm.Code 4731-13-15. The board and two courts have already

considered the question of appellant's guilt. The remand to the board was for the sole purpose of reconsidering the sanction. Appellant is now demanding an opportunity to be heard that she was not entitled to at the first board meeting: an opportunity after the hearing before the hearing examiner but before the board voted on a sanction. See Bharmota v. State Medical Bd. of Ohio (Dec. 7, 1993), 1993 Ohio App. LEXIS 5858, Franklin App. No. 93AP-630, unreported (1993 Opinions 5165); Mustafa v. State Medical Bd. of Ohio (Oct. 17, 1991), 1991 Ohio App. LEXIS 4982, Franklin App. No. 91AP-282, unreported (1991 Opinions 5010). The state is not constitutionally required to provide additional opportunity to be heard merely because appellant's appeals have been pending for five years.

Moreover, the minutes of the August 11, 1993 meeting show that the board considered the impact additional mitigating evidence might have had at that point in the proceedings. The meeting minutes show that the unanimous vote not to remand the case to a hearing examiner for the presentation of further evidence was taken after significant debate, in which board members expressed arguments both in favor of and against remand. This debate over the mitigating evidence demonstrated that the board was not summarily refusing appellant's request to present more evidence. This debate was itself some quantum of process beyond that which is constitutionally required. In addition, appellant's counsel was permitted to speak to the board at this meeting.

Because we conclude that the board's denial of appellant's requests to testify and to present additional evidence in mitigation of sanction did not violate appellant's rights of due process under the Ohio and United States Constitutions, her first assignment of error is overruled.

Under her second assignment of error, appellant argues that permanent revocation of her certificate violates (1) Ohio statutory law, (2) the cruel and unusual punishment provisions of the Ohio and United States Constitutions, and (3) the equal protection provisions of the Ohio and United States Constitutions.

Under the standard of review in appeals from the board, the court of common pleas must affirm if the board's order is "supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12, paragraph 13. The standard of review for the court of appeals in appeals of board orders from the court of common pleas, however, is abuse of discretion. That is, the judgment of the trial court will be affirmed unless there is a "perversity of will, passion, prejudice, partiality, or moral delinquency." Pons v. Ohio State Med. Bd. (1993), 66 Ohio St. 3d 619, 621, 614 N.E.2d 748. In this appeal, however, appellant's guilt is not at issue; appellant is challenging only the validity of the sanction. If the board's sanction is within its statutory authority, courts have no authority to reverse or modify it. Roy v. State Medical Bd. (1992), 80 Ohio App. 3d 675, 683, 610 N.E.2d 562; DeBlanco v. Ohio State Medical Bd. (1992), 78 Ohio App. 3d 194, 202, 604 N.E.2d 212; Sicking v. Ohio State Medical Bd. (1991), 62 Ohio App. 3d 387, 395, 575 N.E.2d 881; Angerman v. Ohio State Medical Bd. (1990), 70 Ohio App. 3d 346, 353, 591 N.E.2d 3; In re Jones (1990), 69 Ohio App. 3d 114, 121, 590 N.E.2d 72; Kuzas v. Ohio State Medical Bd. (1990), 67 Ohio App. 3d 147, 150, 586 N.E.2d 210. Because permanent revocation is an authorized sanction under R.C. 4731.22(B), appellant's sanction was consistent with Ohio statutory law.

Appellant also asserts that revocation of her certificate constitutes cruel and unusual punishment in violation of the Ohio and United States Constitutions. First, the Eighth Amendment generally applies only to criminal prosecutions and punishments. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. (1989), 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219; Ingraham v. Wright (1977), 430 U.S. 651, 664-668, 97 S. Ct. 1401, 1408-1411, 51 L. Ed. 2d 711; State ex rel. Matz v. Brown (1988), 37 Ohio St. 3d 279, 280, 525 N.E.2d 805 (per curiam); In re Complaint of Sarver (1990), 70 Ohio App. 3d 471, 479, 591 N.E.2d 388. Therefore, the state's revocation of appellant's certificate is not subject to review under the Eighth Amendment.

Second, as a general rule, a sentence that falls within the terms of a valid statute cannot amount to cruel and unusual punishment.

McDougle v. Maxwell (1964), 1 Ohio St. 2d 68, 69, 203 N.E.2d 334 (per curiam). Therefore, even assuming that revocation of appellant's certificate was reviewable under the Eighth Amendment, the revocation would not be unconstitutional.

Third, even assuming that the proportionality principle of Solem v. Helm (1983), 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637, were applicable in this case, we would not find revocation so disproportionate as to constitute cruel and unusual punishment. According to the hearing examiner's report:

" *** Dr. Vaughn routinely prescribed Obetrol, a Schedule II amphetamine anorectic, and other stimulant controlled substance anorectic for treatment of overweight or obesity. Dr. Vaughn did not require that patients be obese by medical definition (20% over ideal weight), but accepted any adult who was 20 lbs. or more overweight for treatment in her 'diet program.' Dr. Vaughn initiated treatment with amphetamines upon patients' first visits, without first objectively establishing that the patients were refractory to other methods of weight loss, and without performing adequate workups and evaluations. Dr. Vaughn's patient records are generally devoid of laboratory studies or any other evidence which would indicate that she made an effort to identify either etiological factors or problems which might be attendant with obesity and potentially exacerbated by weight loss. Often, patient records show that stimulant medications were prescribed to female patients without establishing that they were not pregnant or at risk for pregnancy. In one case, a patient apparently became pregnant during the course of her treatment with amphetamines. In some cases, stimulant appetite suppressants were inappropriately prescribed for patients who had elevated blood pressure readings. Further, Dr. Vaughn often maintained patients on Obetrol and other stimulant anorectic for an appropriately long periods of time, many in excess of three months, regardless of whether or not any significant weight loss was achieved. Although it was Dr. Vaughn's practice to alternate medications so that patients received Obetrol only every other month, patients were routinely alternated back to Obetrol even when they had gained weight on Obetrol and/or had shown better response to non-amphetamine

medications. It is apparent that Dr. Vaughn failed to exercise appropriate medical judgment in her treatment of diet patients, but rather blindly adhered to inadequate 'protocols' which she had established. ***

" *** It was Dr. Vaughn's practice to prepare pre-signed prescriptions for various controlled substances and dangerous drugs and to distribute them to members of her office staff for completion and issuance to patients. Dr. Vaughn sought to show that this practice entailed little risk of unauthorized diversion of prescriptions. She claimed not only that her office layout made it unlikely that patients could gain access to the pre-signed prescriptions, but also that her office policies and daily prescription monitoring procedures would prevent unauthorized diversions by her staff. It is apparent, however, that Dr. Vaughn's procedures were not foolproof. As set forth in Finding of Fact #7, above, one of Dr. Vaughn's office staffers issued herself a prescription for Obetrol during a period when Dr. Vaughn's office was closed and Dr. Vaughn was out of town. Further, as set forth in Finding of Fact #8, above, another office staff person, in Dr. Vaughn's absence, issued two separate prescriptions for 30 Didrex 50 mg. to one patient on the same date. As indicated in Findings of Fact #1 and #2, above, Dr. Vaughn on at least one occasion entrusted one of her employees with pre-signed prescriptions for over 2,000 dosage units of controlled substances and dangerous drugs, as well as 10 pre-signed blank prescriptions, to be issued at that employee's discretion in Dr. Vaughn's absence. ***

" *** It was Dr. Vaughn's practice to authorize her non-physician office staff members, in her absence, to assess, examine, diagnose, and issue pre-signed prescriptions to both new and follow-up patients, acts which constitute the practice of medicine pursuant to Section 4731.34, Ohio Revised Code. There is no merit in Dr. Vaughn's contention that she, rather than her office staff, diagnosed patients whom she did not personally see or examine. Although a tentative diagnosis might have been made by Dr. Vaughn prior to a patient's visit, such diagnosis could be confirmed only by

the person who actually examined and assessed the patient. Dr. Vaughn's further contention, that such assessments and initiations of treatments by her office staff were acceptable because they were done in accordance with 'protocols' which she had established, is well-rebutted by the testimony of Dr. Steven William Jennings (see Finding of Fact #13). As Dr. Jennings pointed out, the diagnosis and treatment of obesity requires clinical judgments by a physician. Certainly, the evidence establishes that Dr. Vaughn's 'protocols' were inadequate, calling for rote prescribing for all diet patients without regard to variant problems and needs, and creating unnecessary risks to patients. Dr. Jennings cited instances where Dr. Vaughn's patients were issued prescriptions for stimulant medications despite elevated blood pressures and risks of pregnancy. *** " (Report and Recommendation of the Hearing Examiner, at 29-30.)

Given the threat to patients' health posed by appellant's conduct, revocation is not a disproportionate sanction.

Appellant also asserts that revocation of her certificate constitutes a violation of the equal protection principles of the Ohio and United States Constitutions. Appellant claims that she was punished much more severely than other physicians who engaged in more egregious behavior and that this disparity can be explained only by discrimination based on race or gender. In an equal protection claim, the alleged victim has the burden of proving discriminatory intent or purpose. Village of Arlington Heights v. Metropolitan Housing Development Corp. (1977), 429 U.S. 252, 265, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450. The scope of protection provided by Section 2, Article I of the Ohio Constitution is nearly identical to that provided by the United States Constitution. Sorrel, supra, at 424.

Appellant offered no evidence to support her claim of discrimination other than a list of other physicians who received lesser sanctions. The board offered its own list of physicians whose certificates were revoked. We agree with the court of common pleas that "the information provided is insufficient for the Court to conclude that the Board violated Appellant's right to equal protection based on a comparison of the discipline of the cited physicians and

that of the Appellant." (Trial Court Decision, Mar. 20, 1995, at 6.) Appellant's second assignment of error is overruled.

In her third assignment of error, appellant asserts that the board's revocation of her certificate was not in compliance with the March 25, 1992 remand order of the court of common pleas. That order remanded the case "to the Board for a disciplinary hearing and/or a finding consistent with this Order and the Appellate Court's decision." Appellant argues that this language constituted an order by the court of common pleas that the board conduct a disciplinary hearing that included the right to present mitigating evidence and the right to speak to the board. We disagree. Given the court's use of the disjunctive "or," the plain meaning of the court's order gave the board the option of merely rendering a finding consistent with the courts' decisions. Because the board's revocation of appellant's certificate did not violate the court's remand order, the third assignment of error is overruled.

In assignments of error four through eight, appellant challenges the constitutionality of the fifteen-month limitation on stays in paragraph eight of R.C. 119.12. R.C. 119.12 provides in pertinent part:

" *** In the case of an appeal from the state medical board or chiropractic examining board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. ***

" ***

"Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board or chiropractic examining board that

limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of such a certificate shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, or upon the rendering of a final decision or order in the appeal by the court of common pleas, whichever occurs first."

Because this court granted appellant's motion for stay of revocation pending appeal on August 25, 1995, the assignments of error pertaining to R.C. 119.12 are moot.

Ohio courts generally will not decide questions that are moot. However, a court may, in its discretion, decide moot questions that (1) are capable of repetition yet evading review, In re Appeal of Suspension of Huffer from Circleville High School (1989), 47 Ohio St. 3d 12, 546 N.E.2d 1308, paragraph one of the syllabus; State ex rel. Plain Dealer Publishing Co. v. Barnes (1988), 38 Ohio St. 3d 165, 527 N.E.2d 807, paragraph one of the syllabus; Wallace v. University Hospitals of Cleveland (1961), 171 Ohio St. 487, 489, 172 N.E.2d 459; or (2) involve a matter of public or great general interest, Huffer, supra, at 14 and fn. 5; Franchise Developers, Inc. v. Cincinnati (1987), 30 Ohio St. 3d 28, 31, 505 N.E.2d 966; In re Popp (1973), 35 Ohio St. 2d 142, 144, 298 N.E.2d 529.

The question of the constitutionality of the fifteen-month limit on stays is moot as to appellant because she "has obtained all that she asks for *** and no order could be made by this court that would give her more than she already has." Wallace, supra, at 488-489. Appellant argues that she would benefit from our holding that the fifteen-month limit is unconstitutional because, absent a further stay pending an appeal to the Supreme Court, she would be denied the opportunity to practice. Appellant is incorrect. The stay granted by this court on August 25, 1995, was equivalent to the stay that the court of common pleas would have granted -- -- a stay pending appeal. Because both a stay granted by the court of common pleas and a stay granted by this court expire with the rendering of judgment by this court, appellant would be in the same position regardless of which court had granted the stay.

Because appellant cannot benefit from our ruling that the fifteen-month limit is unconstitutional, the issue is moot. We decline to address the issue under either of the exceptions to the mootness doctrine. Therefore, appellant's assignments of error four through eight are rendered moot.

For the foregoing reasons, appellant's first, second, and third assignments of error are overruled, and her fourth, fifth, sixth, seventh, and eighth assignments of error are moot; and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN, P.J., and PETREE, J., concur.

DISPOSITION

Judgment affirmed.

APPENDIX C

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of Mattie L. Vaughn, M.D.,	:	
Appellant-Appellant,	:	No. 95APE05-645
v.	:	(REGULAR CALENDAR)
The State Medical Board of Ohio,	:	
Appellee-Appellee.	:	FILED COURT OF APPEALS FRANKLIN CO., OHIO November 30, 1995, 3:29 p.m. Jessie D. Oddi Clerk of Court

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on November 30, 1995, appellant's first, second, and third assignments of error are overruled, and her fourth, fifth, sixth, seventh and eighth assignments of error are moot; and it is the judgment and order of this court that ten judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

BOWMAN, P.J., PETREE & LAZARUS, JJ.

/s/ Cynthia C. Lazarus, JJ.
Judge Cynthia C. Lazarus

cc: Michael F. Colley, Esq.
David K. Frank, Esq.
Betty D. Montgomery, AG
Anne Berry Strait, AAG

APPENDIX D

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of	:	FILED
Mattie L. Vaughn, M.D.	:	COURT OF APPEALS
	:	FRANKLIN COUNTY
Appellant-Appellant	:	AUGUST 25, 1995 9:20 A.M.
	:	JESSIE D. ODDI
v.	:	CLERK OF COURTS
	:	
The State Medical	:	No. 95APE05-645
Board State of Ohio,	:	(REGULAR MAIL)
Appellee-Appellee	:	

JOURNAL ENTRY

Appellant's motion for a stay of execution of the trial court judgment pending is granted conditioned upon appellant's posting with the clerk of the trial court, not later than September 1, 1995, a supersedeas bond in the amount of $100.00.

/s/ Judge John C. Young
Judge John C. Young

/s/ Judge G. Gary Tyack
Judge G. Gary Tyack

/s/ Judge Dean Strausbaugh
Judge Dean Strausbaugh, retired of the Tenth Appellate District, assigned to active duty under the

authority of Section 6(C), Article IV, Ohio Constitution.

cc: Michael F. Colley
David K. Frank
Betty Montgomery, AG
Anne Berry Strait, AAG

APPENDIX E

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

MATTIE L. VAUGHN, M.D.,	:	CASE NO. 90CVF-2480
	:	
Appellant,	:	JUDGE NODINE MILLER
	:	
v.	:	FILED
	:	COURT OF APPEALS
THE STATE MEDICAL	:	FRANKLIN CO. OHIO
BOARD OF OHIO,	:	MAY 24, 1995 A.M. 9:33
	:	
Appellee.	:	

JUDGMENT ENTRY
AFFIRMING THE AUGUST 13, 1993 ORDER
OF THE STATE MEDICAL BOARD OF OHIO

This cause is before the Court upon the appeal, pursuant to R.C. 119.12, of the August 13, 1993 order of the State Medical Board of Ohio. For the reasons stated in the decision of this Court rendered March 20, 1995, and filed on March 21, 1995, which decision is incorporated by reference as if fully rewritten herein, it is hereby **ORDERED, ADJUDGED AND DECREED,** that judgment is hereby entered in favor of Appellee, the State Medical Board of Ohio, and the August 13, 1993 order of ten State Medical Board in the Matter of Mattie L. Vaughn, M.D. is hereby affirmed. Costs to

Appellant.

/s/ Judge Nodine Miller
JUDGE NODINE MILLER

APPROVED:

/s/ Anne Berry Strait
Assistant Attorney General
Health & Human Services Section
30 East Broad Street, 26th floor
Columbus, Ohio 43215-3428
(614) 466-8600
Attorney for Appellee

/s/ Michael F. Colley

/s/ Elizabeth S. Burkett
ELIZABETH S. BURKETT
Michael F. Colley & Associates
536 South High Street
Columbus, Ohio 43215
(614) 228-6453
Attorneys for Appellant

APPENDIX F

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO, CIVIL DIVISION

MATTIE L. VAUGHN, M.D	:	CASE NO. 90CVF-2480
	:	
Appellant,	:	JUDGE NODINE MILLER
	:	
v.	:	FILED
	:	COMMON PLEAS COURT
THE STATE MEDICAL	:	FRANKLIN CO. OHIO
BOARD OF OHIO,	:	MAY 12, 1995 P.M. 3:53
	:	JESSI D. ODDI
Appellee.	:	CLERK OF COURTS
	:	

Decision and Journal Overruling Appellant Mattie L. Vaughn, M.D.'s Request and Motion for Reconsideration Filed on March 30, 1995 and Appellant, Mattie Vaughn, M.D.'s Amended Application For an Order Continuing the Stay of Revocation of Her Certificate to Practice Medicine And Surgery Filed on April 12, 1995

Rendered this 11th day of May, 1995.

Miller, J.

On March 20, 1995, the Court rendered its decision ("Decision") upon an administrative appeal filed by Appellant, Mattie L. Vaughn, M.D. ("Vaughn") on March 10, 1994. That Decision affirmed the order of the Ohio State Medical Board, ("the Board") finding the Board's order to have been supported by reliable, probative, and substantial evidence. This Decision was not journalized.

On March 30, 1995, Vaughn filed a Request and Motion for Reconsideration of the Decision. On April 12, 1995, the Board filed its Memorandum Contra Vaughn's Motion. On April 24, 1995, Vaughn filed her Reply Memorandum in Support of her Motion for Reconsideration.

I. THE BOARD'S FAILURE TO FILE A JUDGMENT ENTRY MEMORIALIZING THIS COURT'S MARCH 20, 1995 DECISION AFFIRMING THE ORDER OF EH OHIO STATE MEDICAL BOARD

The final paragraph of the Decision state "[t]herefore, in the light of the foregoing, this Court hereby **AFFIRMS** the order of the Ohio State Medical Board. Counsel for Appellee shall prepare and submit an appropriate entry in accordance with Local Rule 25.01."

Rule 25.01 of the Rules of Practice of the court of Common Pleas provides in pertinent part:

> "Unless the Trial Judge otherwise directs, counsel for the party in whose favor a decision, order, decree, or judgment is rendered, shall within five days thereafter prepare the proper journal entry and submit it to the counsel for the adverse party, who shall approve or reject the entry within three days after receipt. ***"

The Decision in this case was signed by the Court on March 20, 1995 and filed stamped on March 21, 1995. Given three (3) days for mail delivery to the parties, counsel for the Board had until Monday, March 30, 1995 to prepare and submit a proposed judgment entry to counsel for Vaughn. On Monday, March 30, 1995 at 10"37 a.m., Vaughn filed her Request and Motion for Reconsideration. The Court finds that under the circumstances it would have been impossible for the Board to have filed a final Judgment Entry incorporating the Court's decision on Vaughn's appeal within the time allotted by the local rules. Because of the foregoing, the Court intends to treat its Decision filed on March 21, 1995, as a judgment for the sole purpose of considering Vaughn's Request and Motion for Reconsideration.

II. VAUGHN'S REQUEST AND MOTION FOR RECONSIDERATION

In Pitts v. Ohio Dept. of Transportation (1981), 67 Ohio St.2d

378, 21 O.O. 3d 238, 423 N.E. 2d, 1105, the Ohio Supreme Court said at 379-80:

> "Interpretation of the Rules of Civil Procedure and practical considerations warrant our determination that motions for reconsideration of a final judgment in the trial court are a nullity.
>
> [T]he Rules of Civil Procedure specifically limit relief from judgments to motions expressly provided for within the same Rules. A motion for reconsideration is conspicuously absent with the Rules.
>
> * * *
>
> This court is not fashioning a new interpretation by the foregoing, but rather it has advanced this same policy on various occasions. William W. bond, Jr. and Assoc. v. Airway Development Corp.(1978), 54 Ohio St. 2d 363, and Kauder v. Kauder (1974), 38 Ohio St.2d 265. See, also, Browne, The Fatal Pause--Summary Judgment and the Motion for Reconsideration, 44 Cleve. Bar J. 7."

See also, State, Ex Rel. Pendell v. Bd. of Elections (1988), 40 Ohio St.3d 58 at 60 and Collini v. Cincinnati (1993), 87 Ohio App. 3d553 at 555.

A Motion for Reconsideration of a decision on an administrative appeal is an aberration. The Franklin county Court of Appeals said in Garfield Heights City School District v. State Board of Education (1992), 85 Ohio App. 3d 117 at 121:

> "R.C. 119.12 provides for an appeal to the common pleas court from certain state administrative agency orders. Under this provision, the court is charged with determining whether there was substantial, reliable, and probative evidence in accordance with the law to support the agency's decision. Univ. of Cincinnati v. Conrad (1980), 63 Ohio St. 2d 108, 17 O.O.3d 65, 407 N.E.2d 1265. Like other judgments,

> the court's judgment in this regard is accorded finality. R.C.119.12 expressly provides that '[t]he judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal." There is no provision in R.C.119.12 for relief from judgment. Giovanetti v. Ohio State Dental Bd. (1990), 66 Ohio App. 3d 381, 584 N.E. 2d 66; Stover v. Cty. Commrs. (July 2, 1985), Franklin App. No. 84AP-1085, unreported, 1985 WL 10056. Rather errors should be corrected by further appeals as provided for in R.C. 119.12 Tozzi v. Bur of Motor Vehicles (June 8, 1978), Cuyahoga App. No. 37495, unreported."

Based on the foregoing, the Court hereby **OVERRULES** the Request and Motion of Appellant Mattie L. Vaughn, M.D. for Reconsideration of the Court's Decision filed March 21, 1995.

III. VAUGHN'S AMENDED APPLICATION FOR AN ORDER CONTINUING THE STAY OF REVOCATION OF HER CERTIFICATE TO PRACTICE MEDICINE AND SURGERY

On April 7, 1995, Vaughn filed with the Court her Application for an Order Continuing the Stay of Revocation of Her Certificate to Practice Medicine and Surgery. On April 12, 1995, Vaughn filed he Amended Application for an Order Continuing the Stay of Revocation of Her Certification to Practice Medicine and Surgery. On April 18, 1995, the Board filed its Memorandum Contra Vaughn's Amended Application. On April 26, 1995, Vaughn filed her Reply Memorandum in Support of her Amended Application for an Order Continuing the Stay of Revocation of Her Certificate to Practice Medicine and Surgery.

R.C.119.12 governs the issuance of a stay of the Order of the Board. The applicable paragraphs provide:

> "In case of an appeal from the State Medical Board

> *** the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order PENDING DETERMINATION OF THE APPEAL and health, safety, and welfare of the public will not be threatened by suspension of the order.
>
> * * *
>
> Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board *** that limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of such a certificate shall terminate not more than FIFTEEN MONTHS AFTER THE DATE OF THE FILING OF A NOTICE OF APPEAL IN THE COURT OF COMMON PLEAS, OR UPON THE RENDERING OF A FINAL DECISION OR ORDER IN THE APPEAL BY THE COURT OF COMMON PLEAS, whichever occurs first." (Emphasis added).

Paragraphs one above sets forth the criteria for determining the appropriateness of suspending an order of the state medical board, giving the court the authority to do so PENDING DETERMINATION OF THE APPEAL. A determination of Vaughn's appeal was made by this Court on March 21, 1995, when it affirmed the Board's order. Therefore, the enumerated criteria, with which Vaughn's Application is laced, is of no significance at this stage of the case.

Paragraph two above sets forth two circumstances which mandate the termination of a stay of an order of the Board: (1) the expiration of 15 months or (2) a final decision or order on the appeal. Vaughn filed her Notice of Appeal to the common pleas court on September 3, 1993. This Court stayed the execution of the Board's Order on October 4, 1993. More than nineteen (19) months

have elapsed since the issuance of this Court's stay on October 4, 1993, a stay which has clearly expired by its own terms. "A final decision or order in the appeal" was handed down on March 21, 1995. Both conditions have clearly been met. The Franklin County Court of Appeals examined these limitations and found them to be constitutional in Plotnick v. State Medical Board of Ohio, (September 27, 1984), Franklin App. Nos. 84AP 225 and 84AP 362, unreported. Therefore, the Court **DENIES** the Amended Application of Appellant, Mattie L. Vaughn, M.D. for an Order Continuing the Stay or Revocation of Her Certificate to Practice Medicine and Surgery.

IT IS SO ORDERED.

/s/ Judge Nodine Miller 5/11/95
Judge Nodine Miller

Copies to:
Michael F. Colley
Elizabeth S. Burkett
Attorneys for Appellant

Anne B. Straight
Attorney for Appellee

APPENDIX G

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO, CIVIL DIVISION

MATTIE L. VAUGHN, M.D	:	CASE NO. 90CVF-2480
	:	
Appellant,	:	JUDGE NODINE MILLER
	:	
v.	:	FILED
	:	COMMON PLEAS COURT
THE STATE MEDICAL	:	FRANKLIN CO. OHIO
BOARD OF OHIO,	:	95 MAR 21 A.M. 10:24
	:	JESSE D. ODDI
Appellee.	:	CLERK OF COURTS
	:	

DECISION

Rendered this 20th day of March, 1995.

MILLER, J.

This case came before this Court upon an administrative appeal filed by Mattie L. Vaughn, M.D. (Appellant) on March 10, 1994.

This case arose in 1986 when the State Medical Board of Ohio (Appellee) issued a Notice of Opportunity for Hearing alleging that Appellant violated several provisions of Ohio Revised Code 4731.22 (B). On November 21, 1986, the notice was amended to include an additional violation of Ohio Revised Code 4731.22(B). An administrative hearing was conducted on April 13, 1989 before a Hearing Examiner. On February 2, 1990, the Hearing Examiner issued a report recommending that Appellant's license be revoked. The Board affirmed the Hearing Examiner's report and issued an order permanently revoking Appellant's license to practice medicine

within the State of Ohio for violation of Ohio Revised Code 4731.33(B)(1),(2),(3),(4),(6), and (16).

Appellant appealed the Board's order and on August 15, 1990, the Court affirmed that part of the order finding that Appellant violated Ohio Revised Code 4731.22(B)(1),(2),(3),(4),(6), and (16) and reversed that part of the order finding that Appellant violated Ohio Revised Code 4731.22(B)(1) and (3).

In an amended decision filed on September 7, 1990, the trial court remanded the case to the Board for new review to be conducted regarding the appropriate discipline to be imposed given its prior decision. On September 25, 1990, the trial court in its judgment entry affirmed in part and reversed in part the Board's Order revoking Appellant's certificate to practice and remanded the matter to the Board for a disciplinary finding consistent with its decisions.

Appellant appealed the trial court's decision to the Tenth Appellate District, Court of Appeals. The appellate court reversed the trial court's decision relative to Ohio Revised Code 4731.22(B)(3) and (4) and remanded the matter for "further proceedings consistent with law and the trial court's decision."

Upon remand the trial court issued a decision on February 19, 1992, finding that the Board's determination that Appellant violated Ohio Revised Code 4731.22(B)(1),(2),(3),(4),(6), and (16) was supported by reliable, probative and substantial evidence. The trial court further found that the Board's determination that Appellant violated Ohio Revised Code 4731.22(B)(4) was not supported by reliable, probative and substantial evidence. On March 25, 1992, the trial court issued an entry journalizing its decision and remanding the case to the Board "for a disciplinary hearing and/or a finding consistent with this Order and the Appellate Court's decision."

Appellant moved that the Board to remand the matter to a hearing officer for the purpose of presenting new an mitigating evidence. The Board met on August 11, 1993. After a thorough discussion, the Board voted to deny Appellant's Motion for Remand

on the basis that the Board's decision was based upon what happened in 1986 not what happened after 1986 and that any information beyond 1986 would not be necessary. The Board, by majority vote, revoked Appellant's certificate permanently. On August 13, 1993, the Board ordered that "the certificate of Mattie L. Vaughn, M.D. to practice medicine and surgery in the State of Ohio be and is hereby **PERMANENTLY REVOKED."**

Appellant filed this appeal pursuant to Ohio Revised Code 119.12. According to Ohio Revised Code 119.12, this Court must affirm the Board's order if it finds that the order is supportive by reliable, probative and substantial evidence. Univ. of Cincinnati v. Conrad (1980), 63 Ohio St.2d 108, 111.

In this case, the Board's order finding that Appellant violated Ohio Revised Code 4731.22(B)(1),(2),(3),(4),(6), and (16) was affirmed by the trial court and upheld by the appellate court as being supported by reliable, probative and substantial evidence. Thus, the issue before the Court is not whether the Board's finding that Appellant's violation of these provisions of the statute is supported by reliable, probative and substantial evidence; but whether Appellant's various rights were violated by the Board and whether the permanent revocation of Appellant's license was appropriate in light of the violations, which were affirmed on appeal.

It has been established that Appellant violated the following provisions of Ohio Revised Code 4731.22(B):

> **Ohio Revised Code 4731.22(B)(1):** Permitting one's name or one's certificate of registration to be used by a person, group or corporation when the individual concerned is not actually directing the treatment given;
>
> **Ohio Revised Code 4731.22(B)(2):** Failure to use reasonable care discrimination in the administration of drugs, or failure to employ acceptable scientific methods in the selection of drugs or other modalities

for treatment of disease;

Ohio Revised Code 4731.22(B)(3): Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes or a plea of guilty to, or a judicial finding of guilt of, a violation of any federal or state law regulating the possession, distribution, or use of any drug;

Ohio Revised Code 4731.22(B)(6): A departure from, or the failure to conform to, minimal standards of care of similar practioners under the same or similar circumstances, whether or not actual injury to a patient is established;

Ohio Revised Code 4731.22(B)(16): Violating or attempting to violate, directly, or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the Board *** (as in effect prior to March 17, 1987).

As a result, the Board upon remand permanently revoked Appellant's certificate to practice medicine in the State of Ohio. Appellant claims that by failing to admit additional mitigating evidence and by resuing to allow Appellant to give a statement to the Board, Appellant's right to due process and equal protection were violated; the penalty was excessive under the circumstances; and the Board failed to comply with the remand order of the Court.

Due process encompasses notice and an opportunity to be heard. Korn v. Ohio State Medical Bd. (1988), 61 Ohio App. 3d 677. A review of the procedural history of this case reveals that a notice setting forth the alleged violations was issued in 1986 and an administrative hearing was conducted before a hearing examiner on April 13, 1989. Appellant was not only given notice of the allegations against her, but she was also afforded a hearing during which she had the opportunity to cross-examine witnesses appearing

against her and to present her own evidence for consideration. It is from the evidence adduced at the administrative hearing that the decisions issued during the appeals process were based. The Board rendered its decision based on the evidence adduced at the administrative hearing. Appellant appealed the Board's decision to the Franklin County Court of Common Please pursuant to Ohio Revised Code 119.12. Upon appeal the trial court was confined to the record certified to it by the Board. Ohio Revised Code 119.12 (Page's 1993). The trial court reviewed the administrative proceeding and rendered its decision on August 15, 1990. All subsequent appeals resulted from the initial administrative hearing conducted on April 13, 1989. thus, Appellant's due process rights were not violated on August 11, 1993, when the Board refused to remand the matter to a hearing examiner.

Second, Appellant claims that she was denied her right to equal protection. She raises the issue of being an African-American female and being treated differently. To support her contention of ^T treatment, Appellant named physicians who were found guilty of violating provisions of the Ohio Revised Code and indicated the penalty imposed by the Board, However, Appellant failed to set forth with specificity the facts and the circumstances surrounding the act or acts committed by the named physicians which resulted in the Board finding a violation and imposing a sanction. The information provided is insufficient for the Court to conclude that the Board violated Appellant's right to equal protection based on a comparison of the discipline of the cited physicians and that of the Appellant.

Third, Appellant claims that the Board did not comply with the Court's order, which was issued on March 25, 1992 and provided that:

> In accordance with the Court of Appeals, Tenth Appellate District's Journal Entry of Judgment filed August 21, 1991, it is hereby **ORDERED** on remand that the State Medical Board of Ohio's Order revoking Mattie L. Vaughn, M.D.'s certificate to practice medicine and surgery based on violations of Ohio

> Revised Code 4731.22(B)(1), (B)(2), (B)(3), (B)(6), and (B)(16), with the exception of (B)(4), is hereby **AFFIRMED.** This matter is Remanded to the Board for a disciplinary hearing and/or a finding consistent with this Order and the Appellate Court's Decision. (emphasis added)

The express language of the order indicates that the Board had the option of having a hearing or rendering a finding consistent with the court's modification of the Board's order. In this case, the Board heard arguments of counsel and deliberated upon the appropriate sanction to impose. The Board found that in light of the violations that were affirmed by the trial court and upheld by the appellate court that a permanent revocation was in order. Therefore, this Court finds that the Board complied with the remand order of the Court, in determining the appropriate penalty for the remaining violations.

Finally, Appellant claims that the permanent revocation, which was imposed against Appellant was excessive. Ohio Revised Code 4731.22(B) provides:

> The board, pursuant to an adjudicatory hearing under Chapter 119 of the Ohio Revised Code and by a vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate ***

The Board has been granted the authority to impose a broad spectrum of penalties. Brost v. Ohio State Medical Board (1991), 62 Ohio St3d 218, 221. These penalties were granted with the intent that the Board would impose a penalty appropriate to the prohibited act or acts committed by the physician. Id. Permanent revocation, albeit the most serious, is a penalty which the Board has the authority to impose.

In an administrative review, the court may not reverse, vacate,

or modify an order which is supported by reliable, probative, and substantial evidence. In this case, it has previously been determined that the violations were supported by the requisite quantum of evidence. Miller v. Ohio Rehab. Serv. Comm. (1993), 85 Ohio App. 3d 701. As a result, the Board has the authority to determine the appropriate punishment for physicians found to have violated the provisions in Ohio Revised Code 4731.22(B). Members of the Board deemed the violations committed by Appellant to be very serious in nature an determined that a permanent revocation was appropriate under the circumstances. The penalty imposed is within the scope of authority granted to the Board, this Court cannot reverse, vacate or modify it. Kuzas v. Ohio State Medical Board (1990), 67 Ohio App.3d 147 at 150; see also Henry's Cafe, Inc. v. Bd of Liquor Control (1959), 170 Ohio St. 233; Keaton v. State (1981), 2 Ohio App.3d 480; and Connors v. Ohio Dept. of Commerce (1982), 7 Ohio App.3d 237. Therefore, this Court cannot and will not reverse, vacate or modify the order of the Board.

Therefore, in light of the foregoing, this Court hereby **AFFIRMS** the order of the Ohio State Medical Board. Counsel for Appellee shall prepare and submit and appropriate entry in accordance with Local Rule 25.01.

IT IS SO ORDERED.

/s/ Judge Nodine Miller 5/11/95
Judge Nodine Miller

Copies to:
Michael F. Colley
Elizabeth S. Burkett
Attorneys for Appellant

Anne B. Straight
Attorney for Appellee

APPENDIX H

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Mattie L. Vaughn, M.D.	:	
Plaintiff,	:	
	:	
vs.	:	Case No. 90CVF-04-2480
	:	
The State Medical Board of Ohio	:	Judge Reece
Defendant.	:	

ENTRY

For good cause shown, Appellant's Motion to Stay Revocation is granted pursuant to evidence heard in argument at the Oral Hearing, held on October 4, 1993.

/s/Judge Reece
Judge Reece

Prepared by:

/s/Elizabeth S. Burkett
Elizabeth S. Burkett (0037113)
MICHAEL F. COLLEY CO., L.P.A.
536 South High Street
Columbus, Ohio 43215
(614) 228-6453
Attorney for Plaintiff

Copies to:
Anne C. Berry, Esq.
Elizabeth S. Burkett, Esq.
Thomas Henderson, Esq.

APPENDIX I

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF *

MATTIE LOU VAUGHN, M.D. *

ORDER AND ENTRY

On or about March 14, 1990, the State Medical Board of Ohio issued its Findings and Order in the Matter of Mattie Lou Vaughn, M.D., whereby Dr. Vaughn's license to practice medicine and surgery in the State of Ohio was revoked. A copy of those Findings and ORder is attached hereto and incorporated herein.

Pursuant to Section 119.12, Ohio Revised Code, Dr. Vaughn appealed the Medical Board's decision to the Franklin County Court of Common Pleas and was granted a stay by Entry dated May 2, 1990, provided that she prescribe no Schedule II or III controlled substances. Subsequently, the Court of Common Pleas issued a decision upholding the Board on the basis of all but two of the Board's findings. In an Amended Decision issued on September 7, 1990, the Court ordered that the case be remanded to the Board for issuance of a new Order consistent with the remaining findings upheld by the Court. Dr. Vaughn's stay was to remain in effect until the Board issued a new disciplinary Order.

Dr. Vaughn appealed the Common Pleas Court's decision to the Court of Appeals. On August 6, 1991, the appellate court issued a decision reversing the lower court's ruling, holding that the only provision of the Board's Findings and Order that had been found to be unsupported by reliable, probative and substantial evidence was the finding that Dr. Vaughn had violated Section 4731.22(B)(4), Ohio Revised Code, by accepting "value points" from a pharmacy for referring patients.

On March 25, 1992, at the direction of the Court of Appeals, the Common Pleas Court entered a judgment affirming the Board's Order

on all of its findings with the exception of the Board's determination that Dr. Vaughn had violated Section 4731.22(B)(4), Ohio Revised Code. The Court then remanded the matter back to the Board for a disciplinary hearing and/or a finding consistent with the courts' rulings.

Upon consideration of the original hearing transcripts and exhibits in the Matter of Mattie Lou Vaughn, M.D.;the March 19, 1990 Findings and Order of the State Medical Board in the Matter of Mattie Lou Vaughn, M.D; Dr. Vaughn's objections to the Attorney Hearing Examiner's Report and Recommendation; minutes of the Board's March 14, 1990 discussion of this matter; and decisions and entries of the Franklin County Court of Common Pleas and the Tenth District Court of Appeals; and in accordance with the instructions of those Courts; and upon approval and confirmation by vote of the Board on August 11, 1990, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for that date.

It is hereby ORDERED that the certificate of Mattie Lou Vaughn, M.D., to practice medicine and surgery in the State of Ohio be and is hereby PERMANENTLY REVOKED.

This Order shall become effective thirty (30) days from the date of mailing of notification of approval by the State Medical Board of Ohio, except that Dr. Vaughn shall immediately surrender her Drug Enforcement Administration certificate and shall not order, purchase, prescribe, dispense, administer, or possess and controlled substances, expect for those prescribed for her personal use by another so authorized by law. In addition, Dr. Vaughn shall not in the interim undertake the care of any not already under her care.

/s/ Carla S. O'Day, M.D.
Carla S. O'Day, M.D.
Secretary

8/13/93
Date

APPENDIX J

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
FINAL APPEALABLE ORDER

MATTIE L. VAUGHN, M.D.,	:	
PLAINTIFF/APPELLANT	:	
vs.	:	CASE NO: 90CVF-042480
	:	JUDGE REECE
STATE MEDICAL BOARD,	:	
DEFENDANT/APPELLEE.	:	

JUDGMENT ENTRY

In accordance with the Court of Appeals, Tenth Appellate District's Journal Entry of Judgment filed August 12, 1991, it is hereby ORDERED on remand that the State Medical Board of Ohio's Order revoking Mattie L. Vaugh, M.D.'s certificate to practice medicine and surgery, based on violations of Ohio Rev. Code 4731.22(B)(1), (B)(2), (B)(3), (B)(6), and (B)(16), with the exception of (B)(4), is hereby AFFIRMED. This matter is remanded to the Board for a disciplinary hearing and/or a finding consistent with this Order and the Appellate Court's decision.

The suspension of the Medical Board's Order shall continue pending remand consideration by the Board's issuance of a decision by the Board consistent herewith.

IT IS HEREBY ORDERED.

/s/ Judge Reece
JUDGE REECE

APPENDIX K

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

MATTIE L. VAUGHN, M.D.,	:	
Appellant,	:	CASE NO. 90CVF-04-2480
vs.	:	JUDGE REECE
STATE MEDICAL BOARD	:	
Appellee	:	

DECISION

Rendered this 19th day of February, 1992. Reece, J.

This cause is before the Court on remand for further proceedings from the Court of Appeals of the Tenth Appellate District which revised the judgment of this Court. The Appellate Court ruled that this Court had abused it's discretion in sustaining one of the basis Appellee used in revoking Appellant license to practice medicine in the State of Ohio. It should be noted that during the pendency of the action Appellant has been practicing medicine under a Court Order issued on May 2, 1990. The Court after a complete review of the record in this case the Courts Judgment Entry of September 25, 1990 is modified as follows:

1. The Board's determination of violation of R.C. § 4731.22(B)(1) is supported by substantial, reliable and probative evidence;

2. The Board's determination of a violation of R.C. § 4731.22(B)(3) is supported by substantial, reliable and probative evidence;

3. There is substantial, reliable and probative evidence to show that R.C. § 4731.22(B)(2) was violated;

4. The Board's determination of violation of R.C. § 4731.22(B)(4) is not supported by evidence;

5. There is substantial, reliable and probative evidence to show that R.C. § 4731.22(B)(16) was violated.

6. There is substantial, reliable and probative evidence to show that R.C. § 4731.22(B)(6) was violated;

7. Appellant was not prejudiced by a lack of consel before the Board.

It is not appropriate for this Court to determine the appropriate

sanction to be imposed against the Appellant since the basis of the Board decision has been modified.

Accordingly, this matter is remanded to the Board for a disciplinary hearing and/or finding consistent with this order and the Appellate Courts decision. The suspension of the Medical Board's Order shall continue pending remand consideration by the Board until the issuance of a decision by the Board consistent herewith.

Counsel for Appellee shall prepare and submit an appropriate judgment entry pursuant to Loc. R. 25.01 within ten (10) days of receipt of this Decision.

/s/ GUY L. REECE II, JUDGE
GUY L. REECE II, JUDGE

Copies to:

Jeffrey M. Holtshulte
Attorney for Appellant

Odella Lampkin
Attorney for Appellee

APPENDIX L

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the matter of Mattie L. Vaughn, M.D.,	:	
Appellant-Appellant	:	
v.	:	No. 90AP-1160
The State Medical Board,	:	(REGULAR CALENDAR)
Appellee-Appellee	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on August 6, 1991, appellant's first and second assignments of error are overruled, appellant's third assignment of error is sustained, the State Medical Board's cross-assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion.

STRAUSBAUGH, BRYANT & KLINE, JJ.

By Roger L. Kline
Judge Roger L. Kline, of the
Pickaway County Court of
Common Pleas, sitting by
Assignment in the Tenth
Appellate District.

cc: Jeffrey M. Hostschulte
John C. Dowling

APPENDIX M

In the matter of Mattie L. Vaughn, M.D.,
Appellant-Appellant,
vs.
The State Medical Board, Appellee-Appellee

No. 90AP-1160

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1991 Ohio App. LEXIS 3796

August 6, 1991, Rendered

Appeal from the Franklin County Court of Common Pleas.

COUNSEL

MATAN & SMITH and MR. JEFFREY M. HOLTSCHULTE, for appellant.

MR. LEE FISHER, Attorney General, and MR. JOHN C. DOWLING, for appellee.

JUDGES

Kline, J. Strausbaugh and Bryant, JJ., concur. Kline, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

AUTHOR: KLINE

OPINION

This is an appeal by appellant, Mattie L. Vaughn, M.D., from a judgment of the Franklin County Court of Common Pleas affirming in part and reversing in part the decision of appellee, The State Medical Board of Ohio ("board"), which revoked appellant's certificate to practice medicine and surgery in the state of Ohio.

On September 29, 1986, the board issued to appellant a notice of opportunity for hearing, alleging that appellant had violated various provisions of R.C. 4731.22 which sets forth the ground for disciplining a holder of a certificate to practice medicine and surgery within the state. The board alleged that appellant had allowed her nursing staff to operate her medical practice in her absence, which included assessing, examining, and diagnosing patients for treatment of obesity. In addition, the board alleged that appellant prescribed Schedule II stimulants to diet patients without proper examination and testing and that she directed her patients to two pharmacies from which she received value points which were redeemable for goods and services. On November 21, 1986, the board amended its notice of opportunity for hearing so as to include an additional allegation concerning the prescribing of controlled substances. The parties also note that appellant was indicted for alleged criminal conduct arising out of the foregoing but, following trial, the charges were dismissed.

An administrative hearing was held before a hearing examiner of the board who issued her report and recommendation on February 2, 1990, recommending the revocation of appellant's certificate to practice medicine and surgery. Appellant then filed objections to the report and recommendation. However, the board at a public meeting held on March 14, 1990, voted to approve the referee's recommendation, and by letter dated March 16, 1990, informed appellant of its decision. Pursuant to R.C. 119.12, appellant appealed the board's order to the Franklin County Court of Common Pleas. On August 15, 1990, the trial court affirmed the board's order finding that appellant had violated R.C. 4731.22(B)(2), (4), (6) and (16) but reversed that portion of the order finding that appellant had violated R.C. 4731.22(B)(1) and (3). In an amended decision filed on September 7, 1990, the trial court remanded the case to the board for a new review to be conducted regarding the appropriate discipline to be imposed given its prior

decision. On September 25, 1990, the trial court in its judgment entry affirmed in part and reversed in part the board's order revoking appellant's certificate to practice and remanded the matter to the board for a disciplinary finding consistent with its decisions.

On appeal, appellant has set forth three assignments of error for this court's review:

"I. The trial court erred in not discrediting the testimony of Steven William Jennings, M.D.

"II. The trial court erred in not ruling the deposition of Bruce Kuhn [sic] inadmissible.

"III. The trial court erred in finding substantial, reliable, and probative evidence of violation of Ohio Rev. Code ^U 4731.22(B)(4)."

R.C. 119.12 sets forth the standard which is to be applied by the trial court in reviewing an administrative appeal. Specifically, R.C. 119.12 provides in pertinent part:

"The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. * * *"

The trial court is therefore to affirm the order of the agency from which an appeal has been taken pursuant to R.C. 119.12 where that order is supported by reliable, probative, and substantial evidence and is in accordance with law. Univ. of Cincinnati v. Conrad (1980), 63 Ohio St. 2d 108.

However, upon appeal to an appellate court, the standard of review is more restricted. In Lorain City Bd. of Edn. v. State Emp.

Relations Bd. (1988), 40 Ohio St. 3d 257, the Supreme Court of Ohio set forth the standard by which an appellate court is to review an order of an administrative agency:

"In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. An abuse of discretion '"* * * implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency."' * * * Absent an abuse of discretion on the part of the trial court, a court of appeals must affirm the trial court's judgment. * * *

"The fact that the court of appeals, or this court, might have arrived at a different conclusion than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." Id. at 260-261.

Accordingly, it is within this limited standard of review that we address appellant's assignments of error.

In her first assignment of error, appellant argues that the trial court should have concluded that the testimony of one of the board's expert witnesses was discredited and therefore the board's decision could not be supported by substantial, reliable, and probative evidence. Appellant insists that Steven William Jennings, M.D., should not have been qualified as an expert when he gave testimony regarding appellant's practice.

Although appellant has set forth several reasons for discrediting Jennings' testimony, we are unable to conclude that the trial court abused its discretion in affirming the board's decision. Jennings is board certified in family medicine, having completed three years of residency in that field. Prior to his becoming involved in his current area of specialization involving sleep disorders, Jennings maintained a private practice in family medicine for approximately five years. While

appellant cites various reasons to support her argument that Jennings is unqualified to offer expert testimony, we find that such arguments relate not to the admissibility of such evidence but rather the weight to be given Jennings' testimony. Accordingly, we cannot conclude that the trial court abused its discretion regarding the introduction of Jennings' testimony. Appellant's first assignment of error is therefore not well-taken and is overruled.

In her second assignment of error, appellant argues that the trial court should have ruled the deposition of Bruce Koehn was inadmissible at the administrative hearing before the board. Specifically, appellant argues that while Civ. R. 32(A) provides the grounds upon which a deposition is admissible in lieu of live testimony, the reason advanced for the admission of Koehn's deposition, that he had long-standing vacation plans, did not fall within one of the enumerated provisions. Appellant insists that Koehn's testimony included prejudicial hearsay and that documents which were admitted in conjunction with his testimony should have been found to have been inadmissible before the board.

Appellant's argument initially relies upon the fact that Koehn's deposition given in lieu of live testimony contravenes the enumerated rules given in Civ. R. 32(A) which allow for the introduction of deposition testimony in lieu of live testimony. However, Civ. R. 1(A) specifically states that the Civil Rules apply to courts of the state. Therefore, the Civil Rules are not binding in adjudicatory proceedings before administrative agencies. See Yoder v. Ohio State Bd. of Edn. (1988), 40 Ohio App. 3d 111.

As appellant correctly recognizes, the Rules of Evidence are not strictly applicable to proceedings before the board. Evid. R. 101(A) specifically provides:

"These rules govern proceedings in the courts of this state and before court-appointed referees and magistrates of this state, subject to the exceptions stated in division (C) of this rule."

Accordingly, absent specific statutory authority, administrative

agencies are not bound by the strict Rules of Evidence. Haley v. Ohio State Dental Bd. (1982), 7 Ohio App. 3d 1; Provident Savings Bank & Trust Co. v. Tax Commission (1931), 26 Ohio Law Abs. 175.

Nevertheless, we note the decision in Columbia Twp. Trustees v. Williams (1976), 11 O.O. 3d 233, in which this court held:

"Although a hearing before an administrative agency, or as in this instance an administrative reviewing body, is not conducted, or reviewed, in the same sense as a civil proceeding in a court of law, yet certain of the aspects thereof must be treated similarly. These proceedings are known to be quasi-judicial in nature and they must be conducted with basic concepts of fair play. * * *

"Generally in the absence of statutory provisions to the contrary, an administrative agency may adopt and follow procedures for hearings and fact finding which are not strictly in accord with rules of practice as followed in the trial of civil actions. * * *

"However, administrative agencies may not be permitted to sanction as evidence something which is clearly not evidence. * * * And, an administrative agency should not act upon evidence which is clearly not admissible, competent or probative of the facts which it is to determine. * * *" Id. at 236.

Accordingly, this court must review appellant's argument in light of the foregoing pronouncement.

In the present case, appellant was notified of the time and place of Koehn's deposition. She appeared at the deposition pro se and was given the opportunity to cross-examine the witness. At the beginning of the deposition, the following discussion took place:

"MS. ROSS: Let the record reflect that this is a deposition in lieu of testimony of Mr. Bruce Koehn. My name is Lauren M. Ross, Assistant Attorney General. I am representing the State Medical Board of Ohio in its proceedings concerning Mattie L. Vaughn, M.D. Dr. Vaughn is here today representing herself and has indicated to me before we went

on the record that her previous attorney, Joseph Carr, is no longer representing her and that she is, as I said, representing herself here today.

"Dr. Vaughn, am I correct that you agree that pending a ruling on a motion to admit this deposition in lieu of Mr. Koehn's testimony, that you will consent to that, that this deposition be submitted in lieu of his live testimony at the hearing next week?

"DR. VAUGHN: That is satisfactory.

"MS. ROSS: As I indicated, when I am done with Mr. Koehn here today in terms of my questioning of him, you will have the opportunity to ask him questions and when I am done we can take a break and give you some time to formulate your questions for him, and I will state for the record that if in connection with me asking Mr. Koehn any questions you feel the need to object on any ground, that you have the right to do so. However, it is my understanding since we don't have a hearing officer here to rule on those objections, that any ruling on the objections will have to await the hearing officer and that in the meantime I would then ask and instruct Mr. Koehn to answer the question and your objection will be noted for the record, and we can bring that to the attention of the hearing officer for her ruling.

"DR. VAUGHN: That is satisfactory." (Koehn deposition at 3-4.)

Following the questioning of Koehn by Ross, the following occurred:

"Q. I have no other questions of Mr. Koehn. At this time as I indicated at the outset, I informed Dr. Vaughn that she has the right to examine and ask questions of Mr. Koehn, and I will leave it up to her. If she wants to take a break, then we can discuss how long. Doctor?

"DR. VAUGHN: I wouldn't care do [sic] cross-examine Mr. Koehn.

"MS. ROSS: I guess this deposition can be declared closed. I would like to state on the record, Dr. Vaughn, what I intend to do is to file

a motion with the hearing officer at the Medical Board to remit this deposition in lieu of Mr. Koehn's appearing at the hearing that is presently scheduled for April 13th and 14th. Do you have any objection to such a motion?

"DR. VAUGHN: I have no objection.

"MS. ROSS: Thank you. I will draft something up and forward it to you and the hearing officer, and we will await her ruling then." (Koehn deposition at 60-61.)

In her brief, appellant insists that Koehn's deposition is so replete with prejudicial hearsay that it should have been excluded in its entirety. In Foster v. Bd. of Elections (1977), 53 Ohio App. 2d 213, the court held in pertinent part, in paragraph six of its syllabus:

"Appellate Rule 12(A) provides that any errors not separately argued by brief may be disregarded. Appellate Rule 16(A)(4) requires that the brief contain an argument and that the argument include the contentions of the appellant and the reasons for his conclusion with citations to the appropriate authorities and to the parts of the record relied on. * * *"

Accordingly, this court's review is limited solely to those portions of the record that appellant has specifically argued on appeal.

Appellant first argues that copies of certain documents were allowed to be admitted into evidence even though Koehn had no knowledge of the location of the original document that was allegedly seized during the search on September 5, 1986 of appellant's office. Appellant next argues that Koehn improperly testified by relating the content of alleged conversations with appellant's patients. Again, we note that at the time that this testimony was given, no objection was raised by appellant. Given the remaining evidence, and applying the standard announced in Columbia Twp. Trustees, supra, we cannot conclude that the trial court abused its discretion in not finding Koehn's deposition to be inadmissible at the proceeding before the board. While appellant has an underlying argument that she was prejudiced by a lack of counsel when she appeared at the deposition,

it is apparent from the record that appellant voluntarily elected to proceed without the presence of counsel. As we find no abuse of discretion by the trial court, appellant's second assignment of error is not well-taken and is overruled.

Finally, in her third assignment of error, appellant argues that the trial court erred in concluding that there existed substantial, reliable, and probative evidence that appellant had violated R.C. 4731.22(B)(4). At the time of appellant's alleged violations, R.C. 4731.22(B)(4) provided that the following constituted a ground for discipline by the board:

"Willfully betraying a professional confidence or engaging in the division of fees for referral of patients, or the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business[.]"

In its decision of August 15, 1990, the trial court stated at 3-4:

"There is no question that Vaughn received 'value points,' a thing of value--having an equivalent in money or commodities. Therefore, she violated R.C. 4731.22(B)(4). Had there been some evidence she had refused the value points despite their issuance to her, a contrary finding may have been appropriate. It is of no consequence that there is no direct evidence that Vaughn referred patients to the Taft Pharmacy as a quid quo pro. The mere acceptance of value points regardless of what she did with them constituted a per se violation of said statute. Nevertheless, the absence of any evidence that Vaughn redeemed the value points, even though she had ample opportunity, should necessarily, in the interest of justice, be considered by the Board in determining the appropriate discipline for violation of this statute. The Board's decision regarding the violation of R.C. 4731.22(B)(4) is AFFIRMED."

Upon review of the record, we are unable to conclude that appellant violated R.C. 4731.22(B)(4). This charge was based upon an allegation that in exchange for sending patients to a certain pharmacy, appellant received "value points" which could be redeemed for

merchandise from that pharmacy. The record indicates that appellant had accumulated in excess of seventy thousand value points but there exists no evidence that these value points were in fact exchanged by appellant for merchandise. We are unable to conclude that the mere award of value points by a pharmacy to appellant without any action on her part, constitutes the "receiving of a thing of value" for purposes of R.C. 4731.22(B)(4). While the board points to testimony which indicates that the value points had a monetary value in an amount of twelve and one-half cents, the testimony also indicates that these points could only be redeemed for prizes and not cash. As there exists no evidence that appellant claimed merchandise in exchange for these accumulated value points, we find that the trial court abused its discretion in concluding that the board's decision finding appellant had violated R.C. 4731.22(B)(4) was supported by reliable, probative, and substantial evidence. Accordingly, appellant's third assignment of error is well-taken and is sustained.

The board has also filed a notice of cross-appeal from the trial court's decision and has assigned the following error for this court's review:

"The Court of Common Pleas erred in its construction and interpretation of R.C. 4731.22(B)(3) in that it failed to inquire whether there was evidence that the drugs in question were prescribed by Dr. Vaughn without a 'legitimate therapeutic purpose.'"

In its cross-assignment, the board argues that the trial court erred in its interpretation of R.C. 4731.22(B)(3) which authorizes the board to take disciplinary action for the following:

"Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes or a plea of guilty to, or a judicial finding of guilt of, a violation of any federal or state law regulating the possession, distribution, or use of any drug[.]"

In the present case, the trial court stated in its August 15, 1990 decision:

"To find a violation of R.C. 4731.22(B)(3), a Court must find that drugs are being distributed without a legal or legitimate therapeutic purpose. In this case, the record shows that although drugs were prescribed recklessly, there is no indication that they were distributed for illegal purposes. And, there is no direct evidence of alleged drug trade. For this reason, the Court REVERSES the Board's decision finding a violation of R.C. 4731.22(B)(3)." (Trial court decision at 3.)

It appears that the trial court erred by focusing solely upon whether there was evidence of a legal purpose for appellant's prescribing a Schedule II drug. R.C. 4731.22(B)(3) permits the board to conclude that there has been a violation of this provision when drugs were sold, prescribed, given away, or administered, for other than "legal and legitimate therapeutic purposes." This language indicates that there must be both a legal and legitimate therapeutic purpose for the administration of drugs. In her report and recommendation, the hearing examiner concluded:

"The evidence in this Matter substantially shows that Dr. Vaughn routinely prescribed Obetrol, a Schedule II amphetamine anorectic, and other stimulant controlled substance anorectic for treatment of overweight or obesity. Dr. Vaughn did not require that patients be obese by medical definition (20% over ideal weight), but accepted any adult who was 20 lbs. or more overweight for treatment in her 'diet program.' Dr. Vaughn initiated treatment with amphetamines upon patients' first visits, without first objectively establishing that the patients were refractory to other methods of weight loss, and without performing adequate workups and evaluations. Dr. Vaughn's patient records are generally devoid of laboratory studies or any other evidence which would indicate that she made an effort to identify either etiological factors or problems which might be attendant with obesity and potentially exacerbated by weight loss. Often, patient records show that stimulant medications were prescribed to female patients without establishing that they were not pregnant or at risk for pregnancy. In one case, a patient apparently became pregnant during the course of her treatment with amphetamines. In some cases, stimulant appetite suppressants were inappropriately prescribed for patients who had elevated blood pressure readings. Further, Dr. Vaughn often maintained

patients on Obetrol and other stimulant anorectic for inappropriately long periods of time, many in excess of three months, regardless of whether or not any significant weight loss was achieved. Although it was Dr. Vaughn's practice to alternate medications so that patients received Obetrol only every other month, patients were routinely alternated back to Obetrol even when they had gained weight on Obetrol and/or had shown better response to non-amphetamine medications. It is apparent that Dr. Vaughn failed to exercise appropriate medical judgment in her treatment of diet patients, but rather blindly adhered to inadequate 'protocols' which she had established. Such practice constitutes grounds for disciplinary action under each of the above provisions of law." (Referee's report at 29.)

We agree with the board that the trial court erred in failing to consider the evidence that appellant lacked a legitimate therapeutic purpose for her prescribing a Schedule II drug. Accordingly, the board's cross-assignment of error is well-taken and is sustained.

Based upon the foregoing, appellant's first and second assignments of error are not well-taken and are overruled. Appellant's third assignment of error is well-taken and is sustained. The board's cross-assignment of error is well-taken and is sustained. The judgment of the trial court is hereby reversed and this cause is remanded for further proceedings consistent with the law and this opinion.

Judgment reversed and cause remanded.

DISPOSITION

Judgment reversed and cause remanded.

APPENDIX N

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

MATTIE L. VAUGHN, M.D.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
-vs-	)	Case No. 90CVF04-2480
	)	
STATE MEDICAL BOARD,	)	JUDGE DESHLER
	)	
Defendant-Appellee.	)	

JUDGMENT ENTRY

This matter came before the Court on appeal (R.C. 119.12) from a March 16, 1990, Order of the State Medical Board of Ohio ("Board") revoking Mattie L. Vaughn, M.D.'s ("Vaughn") license to practice medicine and surgery. In revoking her license, the Board adopted the Findings of Fact and Recommendation of the Hearing Examiner. The Board found Vaughn had violated:

1. "R.C. 4731.22(B)(1) - Permitting one's name or one's certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given;

2. "R.C. 4731.22(B)(2) - Failure to use reasonable care discrimination in the administration of drugs***;

3. "R.C. 4731.22(B)(3) - Selling, prescribing, giving away or administering drugs for other than legal and legitimate therapeutic purpose***;

4. "R.C. 4731.22(B)(4) - ***the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business;

5. "R.C. 4731.22(B)(6) - A departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances whether or not actual injury to a patient is established;

6. "R.C. 4731.22(B)(16) (as in effect prior to March 17, 1987) - Violating or attempting to violate, directly , or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the Board," to wit, R.C.4731.41, Practice of Medicine or Surgery Without Certificate.

This matter was submitted to the Court on Briefs filed by each of the parties, and after being fully advised it is the finding of the Court as follows:

1. That the Board's determination of violation of R.C. 4731.22(B)(1) is not supported by the evidence;

2. That the Board's determination of violation of R.C. 4731.22(B)(3) is not supported by the evidence;

3. That there is substantial, reliable and probative evidence to show that R.C. 4731.22(B)(2) was violated;

4. That Appellant received "value points" from Taft Pharmacy and, although this Court finds no evidence of redemption of said "value points," the receipt of the "value points" constitutes a per se violation of R.C. 4731.22(B)(4);

5. That there is substantial, reliable and probative evidence to show that R.C. 4731.22(B)(16) was violated;

6. That there is substantial, reliable and probative evidence to show that R.C. 4731.22(B)(6) was violated; and

7. That Appellant was not prejudiced by a lack of counsel before the Board.

THEREFORE IT IS HEREBY ORDERED, that the Board's decision finding Mattie L. Vaughn, M.D. in violation of R.C. 4731.22 (B)(1) and 4731.22(B)(3) is hereby reversed and vacated;

That the Board's decision finding Mattie L. Vaughn, M.D. in violation of R.C. 4731.22(B)(2), R.C. 4731.22(B)(4), R.C. 4731.22(B)(6), and R.C. 4731.22(B)(16), is hereby affirmed.

IT IS FURTHER ORDERED, that this case is hereby remanded to the Board for a disciplinary finding consistent with this Order and this Court's decisions of August 15, 1990, and September 7, 1990. The suspension of the Medical Board's Order shall continue pending remand for reconsideration by the Board until the issuance of a decision by the Board consistent herewith.

This entry is made as a final appealable Order upon this Court's express determination that there is no just reason for delay.

_____

JUDGE DESHLER

APPROVED:

/s/Jeffrey M. Holtschulte
JEFFREY M. HOLTSCHULTE (HOL-52)
MATAN & SMITH
Attorney for Appellant
261 South Front Street
Columbus, Ohio 43215
(614) 228-2678

/s/John C. Dowling by J.M. Holtschulte
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30 East Broad Street
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APPENDIX O

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

IN THE MATTER OF MATTIE L. VAUGHN, M.D.

MATTIE L. VAUGHN, M.D.	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	Case No. 90CVF04-2480
	:	
THE STATE MEDICAL BOARD	:	JUDGE DESHLER
	:	
Defendant-Appellee	:	

ENTRY SUSPENDING
THE ORDER OF THE STATE MEDICAL BOARD

On motion of the Appellant and for good cause shown, it is the finding of this Court that Dr. Vaughn having previously surrendered her DEA certificate is unable to prescribe Schedule II or III drugs as defined by law; that Dr. Vaughn's present practice is located at the West End Health Center, Inc. and the East End Community Health Center both of Cincinnati, Ohio; that the execution of the Order of the State Medical Board herein would result in an unusual hardship to Appellant and that the health, safety and welfare of the public will not be threatened by suspension of said Order.

THEREFORE, IT IS HEREBY ORDERED that the Order of the State Medical Board of Ohio in the matter of Mattie L. Vaughn is hereby suspended pending the results of this appeal as provided in Ohio Revised Code § 119.12.

IT IS FURTHER ORDERED that as a condition of this Order,

Dr. Vaughn is prohibited from prescribing Schedule II and III drugs as defined by law and shall inform the Ohio State Medical Board in the event the location of her practice changes during this appeal.

/s/ Judge Deshler
JUDGE DESHLER

APPROVED:

/s/J.M. Hostschulte
JEFFREY M. HOLTSCHULTE (HOL-52)
MATAN & SMITH
Attorney for Appellant
261 South Front Street
Columbus, Ohio 43215
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/s/Lauren M. Ross by J.M. Holtschulte
LAUREN M. ROSS (ROS-56)
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APPENDIX P

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF *

MATTIE L. VAUGHN, M.D. *

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio the 14th day of March, 1990.

Upon the Report and Recommendation of Wanita J. Sage, Attorney Hearing Examiner, Medical Board, in this matter designated pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board for the above date.

It is hereby ORDERED that the certificate of Mattie L. Vaughn, M.D., to practice medicine and surgery in the State of Ohio shall be and is hereby REVOKED.

This Order shall become effective thirty (30) days from the date of mailing of notification of approval by the State Medical Board of Ohio, except that Dr. Vaughn shall immediately surrender her Drug Enforcement Administration certificate and shall not order, purchase, prescribe, dispense, administer, or possess any controlled substances, except for those prescribed for her personal use by another so authorized by law. In addition, Dr. Vaughn shall not in the interim undertake the care of any patient not already under her care.

/s/ Henry G. Cramblett, M.D.
Henry G. Cramblett, M.D.
Secretary

March 16, 1990
Date

REPORT AND RECOMMENDATION
IN THE MATTER OF MATTIE L. VAUGHN, M.D.

The Matter of Mattie L. Vaughn, M.D., came on for hearing before me, Wanita J. Sage, Esq., Hearing Examiner for the State Medical Board of Ohio, on April 13, 14, and 19, 1989.

INTRODUCTION AND SUMMARY OF EVIDENCE

I. Basis for Hearing

A. By letter of September 29, 1986 (State's Exhibit #1), the State Medical Board notified Mattie L. Vaughn, M.D., that it proposed to take disciplinary action against her license to practice medicine and surgery in Ohio for one or more of the following reasons:

1. The Board alleged that, when a search of Dr. Vaughn's office was executed pursuant to warrant on September 5, 1986, law enforcement officials found unsecured, at the desks of various office staff persons, pre-signed prescriptions with DEA number; approximately 152 were written for various controlled substances but lacked patient names and addresses, and others were blank except for signature and DEA number. Such acts were alleged to constitute:

a. "Failure to use reasonable care discrimination in the administration of drugs", as that clause is used Section 4731.22(B)(2), Ohio Revised Code;

b. "Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes", at that clause is used in Section 4731.22 (B)(3), Ohio Revised Code; and

c. "A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established", as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

2. The Board further alleged that, at the time the search warrant was executed, Dr. Vaughn's office was found to be in the charge of one Mary Shelton, L.P.N., who in Dr. Vaughn's absence was assessing, examining, and diagnosing patients, including, on that morning of September 5, 1986, Dr. Vaughn's staff issued in her absence prescriptions for various controlled substances to at least 31 patients, including nine new patients who had never been seen by Dr. Vaughn. The Board alleged that such prescribing practices were customarily and regularly employed by Dr. Vaughn in her medical practice and were done with her knowledge and at her direction. Such acts were alleged to constitute:

a. "Permitting one's name or one's certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given", as that clause is used in Section 4731.22(B)(1), Ohio Revised Code;

b. "A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established", as that clause is used in Section 4731.22(B)(6), Ohio Revised Code;

c. "Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this

chapter or any rule promulgated by the Board", as that clause is used in Section 4731.22(B)(16), Ohio Revised Code (as in effect prior to March 17, 1987), to wit: Section 4731.41, Ohio Revised Code, Practice of Medicine or Surgery Without Certificate.

3. In addition, the Board alleged that it was Dr. Vaughn's practice that all first-time patients in excess of twenty pounds over their "ideal weight" be given prescriptions for 30 Obetrol unless another medication was requested by the patient. Such acts were alleged to constitute "failure to use reasonable care discrimination in the administration of drugs" and "failure to employ acceptable scientific methods in the treatment of disease", as those clauses are used Section 4731.22(B)(2), Ohio Revised Code.

4. The Board also alleged that it was Dr. Vaughn's custom and practice to direct her patients to Barrow's and Taft Road Pharmacies to fill prescriptions issued at her office, in exchange for which she received "valuepoints", which were redeemable by her at those pharmacies for goods of services. Such acts were alleged to constitute "the receiving of a thing of value in return for specific referral of a patient to utilize a particular service of business", as that clause is used in Section 4731.22(B)(4), Ohio Revised Code.

Dr. Vaughn was advised of her right to request a hearing in this matter.

B. By letter dated October 8, 1986 (State's Exhibit #1), John H. Burlew, Esq., requested a hearing on behalf of Dr. Vaughn.

C. By letter of November 21, 1986 (State's Exhibit #1), the State Medical Board again notified Dr. Vaughn that it proposed to take disciplinary action against her certificate to practice medicine and surgery in Ohio due to her prescribing of the controlled substances listed on an

attached "Prescription List by Patient Number." The Board alleged that such prescribing constituted violations of Sections 4731.22(B)(2), (B)(3), and (B)(6),Ohio Revised Code.

Dr. Vaughn was advised of her right to request a hearing in this matter.

D. By letter received by the State Medical Board on December 9, 1986 (State's Exhibit #1), John H. Burlew, Esq., requested a hearing on behalf of Dr. Vaughn.

E. The allegations set forth in the Board's letters of September 29 and November 21, 1986, were consolidated for purposes of hearing.

II. Appearances

A. Presented by the State

1. Bruce Todd Koehn, Police Officer and former RENU agent, Cincinnati; by deposition taken on April 5, 1989.

2. Rickie B. Richardson, former Police Officer, Village of Golf Manor.

3. Patricia Ann McMahan, Investigator, State Medical Board

4. Marianne Lawrence, former patient of Dr. Vaughn

5. Mary Ann Shelton, L.P.N., former employ of Dr. Vaughn

6. Leo Okum, Pharmacist and owner of Taft Rd. Pharmacy, Cincinnati

7. Jack Barrow, Pharmacist and former owner of Barrow's Apothecary, Cincinnati

8. Mattie L. Vaughn, M.D., as on cross-examination

9. Steven William Jennings, M.D.

10. Penny McKenzie, Chief of Licensure, State Medical Board; rebuttal witness

B. Presented by the Respondent

1. Stanley Broadnax, M.D.

2. Ann Sala, former office manager for Dr. Vaughn

3. Mattie L. Vaughn, M.D.

IV. Exhibits Examined

The following exhibits were identified and admitted into evidence at hearing or were identified at the deposition of Bruce Todd Koehn and are hereby admitted into evidence in this Matter:

A. Presented by the State at the Deposition of Bruce Todd Koehn

1. Koehn Exhibit #1: September 5, 1986, search warrant issued by the Hamilton County Municipal Court, authorizing the search of Dr. Vaughn's office at 2249 Losantiville, Golf Manor, Ohio, and the seizure of evidence; supporting affidavit of agent Bruce T. Koehn.

2. Koehn Exhibit #2: 19 photographs of the exterior and vicinity of Dr. Vaughn's office taken by Agent Koehn during surveillance prior to September 5, 1986 (Deposition Tr. at 12-13).

3. Koehn Exhibit #3: Notes made by Agent Koehn during surveillances of Dr. Vaughn's office on June 24 and June 27, 1986.

4. Koehn Exhibit #4: Documents received by Agent Koehn from Marianne Lawrence, including: 8/26/86 note to Mr. Koehn form Ms. Lawrence; 8/22/86 receipt for a $35.00 cash payment by Ms. Lawrence for a visit to Dr. Vaughn's office; three-part requisition form for laboratory tests; copies of two prescriptions issued to Marianne Lawrence of August 22, 1986, both written on prescription forms preprinted with the name, address and DEA number of Dr. Vaughn, one signed by Y. Mohlman, M.D., for 15 HCTZ 50mg., the other signed by Dr. Vaughn for 30 Obetrol 20mg.

5. Koehn Exhibit #5: 12 photographs of Dr. Vaughn's office taken on September 5, 1986, when the search warrant was executed.

6. Koehn Exhibit #6: Rough sketch of the layout of Dr. Vaughn's office, number-coded to assist verbal description (see Deposition Tr. at 17-20).

7. Koehn Exhibit #7: Notations made by Officer Richardson, including an inventory of pre-signed prescriptions seized from the desks of Mary Shelton and Victor Jones (Deposition Tr. at 21-22).

8. Koehn Exhibit #8: Specimen envelope labeled "Shelton", found during the search of Dr. Vaughn's premises (original admitted as State's Exhibit #23).

9. Koehn Exhibit #9 through #16: Pre-signed prescriptions seized from the desks of Mary Shelton and/or Victor Jones: #9-11, prescriptions for 30 Adipex-P; #10 -17 prescriptions for 30 Ionomin; #11- 6 prescriptions for 15 Dyazide with 3 refills; #12 - 14 presciptions for 30 Didrex 50mg., and 5 prescriptions for 60 Didrex 50 mg; #13 - 3 prescriptions for 30 Tenuate 75mg. and 5 prescriptions for 15 Tenuate 75mg.; #14 - 11 prescriptions for 30 Obetrol 20mg.; #15 - 1 prescription for 30 Fastin; #16 -1 "excuse script".

Patient name, address, and date is blank on each of these prescriptions.

10. Koehn Exhibit #17: Sample of business cards from Barrow's Apothecary found in the reception area of Dr. Vaughn's office.

11. Koehn Exhibit #18: Sample of business cards from Taft Rd. Pharmacy found in the reception area of Dr. Vaughn's office.

12. Koehn Exhibit #19: Listings of patients and medications for various dates, seized from Dr. Vaughn's desk.

13. Koehn Exhibit #20: Copy of envelope seized from Dr. Vaughn's desk, with notations by Dr. Vaughn regarding Obetrol and Dyazide for new patients (original admitted at State's Exhibit #36).

14. Koehn Exhibit #21: Copy of envelope and June 6, 1986, letter to Dr. Vaughn from a one-time patient, complaining about discourteous treatment she experienced at Dr. Vaughn's office.

15. Koehn Exhibit #22: Copy of hand-written note seized from Dr. Vaughn's desk, setting forth instructions to Ms. Sala regarding, among other things, staff assignments during Ms. Vaughn's absence (original admitted as State's Exhibit #37).

16. Koehn Exhibit #23 through #28: Pre-signed prescriptions seized from Dr. Vaughn's desk, including: #23 - 6 prescriptions for 60 Didrex 50 mg. and 1 prescription for 30 Didrex 50mg.; #24 - 8 prescriptions for 15 Dyazide with 3 refills; #25 - 2 prescriptions for 30 Adipex-P and 1 prescription for 35 Adipex-P; #26 - 10 prescriptions for 15 Tenuate 75mg. and 2 prescriptions for 30 Tenuate 75mg.;#27 -2 prescriptions for 30 Ionomin and 3

prescriptions for 35 Ionomin; #28 - 3 prescriptions for 30 Obetrol 20mg, and 1 prescription for 35 Obetrol 20mg. Patient name, address, and date are blank on each of these prescriptions.

17. Koehn Exhibit #29 - Specimen envelope labeled "Sala", seized from Dr. Vaughn's desk, containing the following pre-signed prescriptions: 1 "excuse prescription"; 4 prescriptions for 30 Obetrol 20mg; 5 prescriptions for 15 Tenuate 75mg.; 2 prescriptions for 30 Tenuate 75mg.; 3 prescriptions for 30 Didrex 50mg.; and 9 prescriptions for 30 Ionomin. Patient name, address, and date are blank on each of these prescriptions.

18. Koehn Exhibit #30: Specimen envelope labeled "Vaughn" ("Davis", on reverse), seized from Dr. Vaughn's desk, containing two voided prescriptions dated 8/4/86, one for Dyazide, the other for 15 Tenuate 75mg.

19. Koehn Exhibit #31: Specimen envelope labeled "Sala", seized from Dr. Vaughn's desk, containing five-pre-signed prescriptions without patient name or address for 15 Tenuate 75mg., and six voided prescriptions written for various patients and medications on August 25, 1986.

20. Koehn Exhibit #32: Specimen envelope labeled "Victor", seized from Dr. Vaughn's desk, containing the following pre-signed prescriptions: 2 prescriptions for 15 Dyazide with 3 refills; 1 prescription for Ionomin (unsigned and missing number to be dispensed); 3 prescriptions for 30 Obetrol 20mg.; and 10 prescriptions for 15 Tenuate 75mg. Patient name, address, and date are blank on each of these prescriptions.

21. Koehn Exhibit #33: File folder labeled "Sala", seized from Dr. Vaughn's desk, containing the following pre-signed prescriptions: 3 prescriptions for 15 Dyazide with

3 refills; 2 prescriptions for 30 Obetrol 20mg.; and 1 "excuse prescription". Patient name, address and date are blank on each of these prescriptions.

22. Koehn Exhibit #34: File folder labeled "Bernadette Kidd", seized from Dr. Vaughn's desk, containing pockets labeled with names of various drugs.

23. Koehn Exhibit #35: Envelope seized from Dr. Vaughn's desk, containing Valupoint Check No. 85198 issued to Dr. Mattie Vaughn by Taft Rd. Pharmacy on August 2, 1986, showing 25,300 "valupoints" earned.

24. Koehn Exhibit #36: Envelope containing a June 11, 1986 memorandum to Dr. Vaughn from Lee Okum, Taft Rd. Pharmacy, asking why no scripts had been received from Dr. Vaughn since June 6, 1986.

25. Koehn Exhibit #37: Copy of envelope and billing to Dr. Mattie Vaughn from Taft Rd. Pharmacy.

26. Koehn Exhibit #38: Copy of Valupoint Check No. 85158 issued to Dr. Mattie Vaughn by Taft Rd. Pharmacy for April-May 1986, showing 53,150 "Valuepoints" earned.

27. Koehn Exhibit #39: Copies of September 5, 1986, appointment lists and sign-in sheets from Dr. Vaughn's office for new patients and return patients.

28. Koehn Exhibit #40A: Ledger book seized from Dr. Vaughn's office, labeled "RETURN PATIENT(S) ONLY", listing patient names and fees charged from 7/1/86, P.M., through 9/5/86, A.M. Despite its labeling, this ledger lists new patients for: 7/31/86, A.M., through 8/4/86, P.M.; 8/11/86, P.M. through 8/12/86, A.M., through 8/21/86, A.M.; and 9/2/86, A.M., through 9/5/86, A.M.

29. Koehn Exhibit #40B: Ledger book seized from Dr. Vaughn's office, labeled "NEW PATIENT(S) ONLY", but listing return patient names and fees charged for 9/2/86, A.M., through 9/5/86, A.M.

30. Koehn Exhibit #40C: Ledger book seized from Dr. Vaughn's office, labeled "NEW PATIENT(S) ONLY", but listing new patient names and fees charged for 7/1/86, A.M., through 7/8/86, A.M.

31. Koehn Exhibit #40D: Ledger book seized from Dr. Vaughn's office, labeled "NEW PATIENT/S ONLY", listing patient names and fees charged from 5/3 through 8/29/86. Despite its labeling, this ledger lists both new and return patients for 6/26/86, P.M., 6/27/86, A.M., 7/28/86, P.M., and 7/29/86, A.M., and only return patients for: 6/25/86, A.M., 7/1/86, A.M.; 7/21/86, P.M., 7/31/86, A.M., through 8/4/86, P.M.; 8/11/86, P.M., through 8/12/86, A.M.; 8/20/86, A.M.; and 8/21/86, A.M. (This Exhibit was also identified and admitted at Respondent's Exhibit S.)

32. Koehn Exhibit # 40E: Ledger book seized from Dr. Vaughn's office, labeled "RETURN PATIENT/S ONLY", listing patients and fees charged from April 1 through June 30, 1986. Despite its labeling, this ledger lists both new patients and return patients from 4/1/86 through 5/2/86, P.M., and for 5/15/86, P.M., and 6/5/86, P.M. (This Exhibit was also identified and admitted at hearing as Respondent' Exhibit R).

33. Koehn Exhibit #41: Height-weight charts for females and males, found posted in the assessment area of Dr. Vaughn's office.

B. Presented by the State at Hearing

1. State's Exhibit #1: Various jurisdictional and scheduling documents, including: the Board's September 29, 1986, citation letter; Dr. Vaughn's October 8, 1986, hearing request; the Board's November 21, 1986, citation letter; Dr. Vaughn's December 3, 1986, hearing request; Respondent's December 12, 1986 motion for continuance of the hearing scheduled for December 17, 1986; State's December 15, 1986, memorandum in response to Repondent's motion for continuance; December 15, 1986 Order of Leonard L. Lovshin, M.D., Hearing Member, granting a continuance and rescheduling the hearing for January 22, 1987; December 17, 1986, letter to John H. Burlew, Esq., from the State Medical Board advising that a hearing scheduled for December 24, 1986, was postponed pursuant to Section 119.09, Ohio Revised Code; January 9, 1987, letter to the State Medical Board from Glenn V. Whitaker, Esq., advising of his substitution as counsel for Dr. Vaughn and requesting a continuance of the January 22,1987, hearing; January 9, 1987, letter to Assistant Attorney General Culley from Attorney Whitaker requesting a list of witnesses and copies of the medical records which were seized from Dr. Vaughn on September 5, 1986; State's January 14, 1987, motion for consolidation of the Board's charges against Dr. Vaughn; September 9,1988, letter to Attorney Burlew and Assistant Attorney General Costantini from Attorney Hearing Examiner Sage, requesting a written status report with regard to this Matter; State's September 20, 1988, status report, enclosing a January 23,1987, Entry of the Hamilton County Common Pleas Court staying the State Medical Board's proceedings against Dr. Vaughn; December 29, 1988, letter to Attorney Burlew and Assistant Attorney General Costantini from Attorney Hearing Examiner Sage requesting a follow-up status report; December 19, 1988, letter from Joseph G. Carr, Esq., advising that the criminal charges against Dr. Vaughn had been dismissed

on October 31, 1988; January 13,1989, letter to the State Medical Board from Attorney Carr advising of his substitution as counsel for Dr. Vaughn and indicating that a hearing could be scheduled; February 1,1989, letter to Attorney Carr from the State Medical Board scheduling the hearing for April 13 and 14, 1989.

2. State's Exhibit #1A: 211-page "Prescription List by Patient Number"; 182-page "Patient Number Key", identifying Patients 1 through 3089. (*Note: Only the "Patient Number Key" portion of this exhibit is sealed.)

3. State's Exhibit #2A: September 19, 1986, Temporary Restraining Order of the Hamilton County Common Pleas Court, restricting Dr. Vaughn's medical practice by suspending her DEA certificate and controlled substance prescribing privileges; prohibiting her in her private practice from practicing medicine on any patient seen by her prior to September 19, 1984; and requiring her to personally attend every patient otherwise seen in the course of her private practice.

4. State's Exhibit #2B: 18-count indictment against Dr. Vaughn, issued by the Hamilton County Grand Jury on December 23, 1986, for trafficking in violation of Section 2925.03(A)(1), Ohio Revised Code, and illegal processing of drug documents in violation of Section 2925.23, Ohio Revised Code.

5. State's Exhibit #2C: January 23, 1987, Entry of the Hamilton County Common Pleas Court, staying the State Medical Board's proceedings against Dr. Vaughn until the conclusion of the trial pending in the Hamilton County Court of Common Pleas, Case No. B-86-5263, upon the condition that Dr. Vaughn continue to comply with the previously issued injunctive order.

6. State's Exhibit #3: Transcript of the April 5, 1989,

deposition of Bruce Todd Koehn.

7. State's Exhibit #4: Copies of the 19 photographs identified and admitted as Koehn Exhibit #2.

8. State's Exhibit #5: Supplementary Investigation Report filed by Police Officer Richardson on June 27, 1986, regarding the questioning of a female patient of Dr. Vaughn and her male companion.

9. State's Exhibit #6: Supplementary Investigation Report filed by Police Office Richardson on July 18, 1986, with regard to the questioning of a female patient of Dr. Vaughn and her male companion.

10. State's Exhibit #7: Nine patient records seized from Dr. Vaughn's office, all containing information indicating that they pertain to new patients seen on September 5, 1986.

11. State's Exhibit #8: 21 patient records seized from Dr. Vaughn's office, 20 of which contain information indicating that they pertain to return patients seen on September 5,1986.

12. State's Exhibit #9: Copies of the 12 photographs identified and admitted as Koehn Exhibit #5.

13. State's Exhibit #10: Notes made by Officer Richardson during the search of Dr. Vaughn's office, including names of employees and Dr. Vaughn's arrival time of 1:32 P.M.

14. State's Exhibit #11: Rough sketch made by Officer Richardson of the layout of Dr. Vaughn's office at 2249 Losantiville.

15. State's Exhibit #12: Copy of September 5, 1986, search

warrant and supporting affidavit (duplicate of Koehn Exhibit #1)

16. State's Exhibit #13: Copies of September 5, 1986, appointment lists and sign-in sheets from Dr. Vaughn which were collected by State Medical Board Investigator McMahan from Cincinnati area pharmacies and were used to compile State's Exhibit #1A.

17. State's Exhibits #14 and #15: Large envelopes containing bundles of the prescriptions of Dr. Vaughn which were collected by State Medical Board Investigator McMahan from Cincinnati are pharmacies and were used to compile State's Exhibit #1A.

18. State's Exhibits #16: Listing prepared by State Medical Board Investigator McMahan of investigative activities, including surveillances, with regard to Dr. Vaughn.

19. State's Exhibits #17: Investigative subpoena issued by the State Medical Board on September 29, 1986, for all medical records of Dr. Vaughn pertaining to patients receiving controlled substances for treatment of overweight during the period from 9/1/85 through 9/16/86; receipt and 52-page inventory from the State Medical Board for 4,449 patient records received from Dr. Vaughn on October 15, 1986. (*Note: Only the inventory portion of this Exhibit is sealed.)

20. State's Exhibits #18: Box of business cards of Barrow's Apothecary, found at front reception area of Dr. Vaughn's office.

21. State's Exhibits #19: Bag of pads of business cards of Taft Rd. Pharmacy, found at front reception area of Dr. Vaughn's office.

22. Lawrence Exhibit #18: Document with regard to

Marianne Lawrence's visit to Dr. Vaughn's office on August 21, 1986, including: billing form, receipt, appointment card, uncompleted history and physical sheet, and laboratory requisition form.

23. Lawrence Exhibit #19: Documents with regard to Marianne Lawrence's visit to Dr. Vaughn's office on August 22, 1986, including: billing form, identification information, completed histroy and physical sheet, and laboratory requisition form.

24. State's Exhibit #20: Sample of business card of Barrow's Apothecary (duplicate of Koehn Exhibit #17).

25. State's Exhibit #21: Sample of business card of Taft Rd. Pharmacy (duplicate of Koehn Exhibit #18).

26. State's Exhibit #22: Copies of documents provided to Agent Koehn by Marianne Lawrence, including: 8/26/86 note from Ms. Lawrence, 8/22/86 receipt from Dr. Vaughn's office, two prescriptions dated 8/22/86, and laboratory requisition form (duplicate of Koehn Exhibit #4)

27. State's Exhibit #23: Specimen envelope labeled "Shelton", seized from the premises of Dr. Vaughn (duplicate of Koehn Exhibit #8).

28. State's Exhibit #30: Sample of business card of Taft Rd. Pharmacy (duplicate of Koehn Exhibit #18 and State's Exhibit #21).

29. State's Exhibit #31: Envelope and June 11, 1986, memorandum to Dr. Vaughn from Lee Okum, Taft Rd.

Pharmacy, asking why no scripts had been received since June 6 (duplicate of Koehn Exhibit #36).

30. State's Exhibit #32: Copy of Valupoint Check No. 85198, issued to Dr. Vaughn by Taft Rd. Pharmacy on August 2, 1986, showing 53,150 "Valupoints" earned (duplicates of Koehn Exhibit #35).

31. State's Exhibit #33: Copy of Valupoint Check No. 85158, issued to Dr. Vaughn by Taft Rd. Pharmacy for April-May, 1986, showing 53,150 "Valupoints" earned (duplicate of Koehn Exhibit #38).

32. State's Exhibit #34: Copy of envelope and billing to Dr. Vaughn from Taft Rd. Pharmacy (duplicate of Koehn Exhibit #37).

33. State's Exhibit #35: Sample of business card of Barrow's Apothecary (duplicate of Koehn Exhibit #17). and State's Exhibit #20).

34. State's Exhibit #36: Envelope seized from Dr. Vaughn's desk, with notations by Dr. Vaughn regarding Obetrol and Dyazide for new patients (duplicate of Koehn Exhibit #20).

35. State's Exhibit #37: Hand-written note seized from Dr. Vaughn's desk, setting forth instructions to Ms. Sala regarding, among other things, staff assignments during Dr. Vaughn's absence (duplicate of Koehn Exhibit #22).

36. State's Exhibit #38: Postcard dated June 18, 1986, sent by Dr. Vaughn to her office staff from Fort McCoy, Wisconsin.

37. State's Exhibit #39: Listing of 172 patients of Dr. Vaughn who received more than three prescriptions, indicating by asterisks (beside every fourth patient's

name) the 58 patients whose medical were submitted to Dr. Steven William Jennings for review.

38. State's Exhibit #40: Chart prepared by Dr. Steven William Jennings, graphing the weights exhibited by 20 patients at the time of each patient's initial visit and after 8 weeks, 12 weeks, and 6 months of treatment in Dr. Vaughn's weight loss program.

39. State's Exhibits #41A and #41B: Dr. Vaughn's medical records for the 58 patients reviewed by Dr. Jennings.

40. State's Exhibit #42: Dr. Vaughn's patient record for Bernadette Kidd (Patient 1531).

C. Presented by the Respondent at Hearing

1. Respondent's Exhibits A and B: Photographs identified by witness Ann Sala as being of Dr. Vaughn's nephew, Brook (Tr. II at 148-149).

2. Respondent's Exhibits C and D: Height-weight charts for females and males used in Dr. Vaughn's office (duplicate of Koehn Exhibit #41).

3. Respondent's Exhibit E: April 7, 1989, letter from Yvonne Walker-Taylor, Wilberforce University, commending Dr. Vaughn's character during her four years as a student at Wilberforce University.

4. Respondent's Exhibit F: April 5, 1989, letter in support of Dr. Vaughn from Alan T. Radnor, Esq.

5. Respondent's Exhibit G: March 5, 1989, letter in support of

Dr. Vaughn from Rev. J.L. Harris.

6. Respondent's Exhibit M: April 5, 1989, letter in support of Dr. Vaughn from Betty Warren, President, West End Community Council.

7. Respondent's Exhibit I: April 4, 1989, letter in support of Dr. Vaughn from Douglas K. Logan, M.D.

8. Respondent's Exhibit J: April 10, 1989, letter in support of Dr. Vaughn from Armando A. Cortez, M.D.

9. Respondent's Exhibit K: April 3, 1989, letter in support of Dr. Vaughn from Gloria C. Hernton, Ph.D.

10. Respondent's Exhibit L: April 5, 1989, letter in support of Dr. Vaughn from Bailey W. Turner, Ph.D.

11. Respondent's Exhibit M: April 4, 1989, letter from Col. Paul D. Crary, Jr., with regard to Dr. Vaughn's service as a Major in the U.S. Army Reserves and as a member of the medical staff of the 311 Station Hospital under his command.

12. Respondent's Exhibit N: April 10, 1989, letter in support of Dr. Vaughn from Carol Hubbard, M.D., Medical Director, West End Health Center.

13. Respondent's Exhibit O: Undated letter in support of Dr. Vaughn from Pearl W. Smith, R.N.

14. Respondent's Exhibit P: Copy of Dr. Vaughn's orders from the Department of the Army to report on June 7, 1986, for active duty training for a period of 15 days at Ft. McCoy, Wisconsin.

15. Respondent's Exhibit Q: April 17, 1989, letter from Murray J. Riggins, M.D., stating that he covered for Dr. Vaughn

from approximately June 6 to June 25, 1986, while she was out of town and her office was closed.

16. Respondent's Exhibit R and S: The office ledgers of Dr. Vaughn identified and admitted as Koehn Exhibits $40E and #40D.

17. Respondent's Exhibit T: Rough sketch of the layout of Dr. Vaughn's office at 2249 Losantiville.

18. Respondent's Exhibit U: DEA Physician's Manual (Rev. 1985), identified with specific reference to pp. 9 and 19.

19. Respondent's Exhibit V: Copy of "Your Report", a newsletter from the State Medical Board, with regard to the Board's adoption of controlled substances rules effective November, 1986.

20. Respondent's Exhibit W: Excerpt (pg. 134) from Pharmacy Law Digest, E.L. Kaluzny, with regard to general requirements for prescriptions for controlled drugs pursuant to Federal Regulation 1306.05.

21. Respondent's Exhibit X: Excerpts from the American Hospital Formulary Service with regard to respiratory and cerebral stimulants, specifically: pp. 1196-1197, regarding amphetamines in general; pg. 1200, regarding diethylpropion hyrochloride; pg. 1201, regarding fenfluramine hydrochloride; and pg. 1211, regarding phentermine.

22. Respondent's Exhibit Y: Excerpt from the Physicians' Desk Reference (1982) with regard to Obetrol.

23. Respondent's Exhibit Z: Copy of article from the Journal of the American Geriatrics Society (1966, Vol. 14, No. 6), entitled "Comparison of Weight Losses with Three Reducing Regimens--Diet, Therapy, Phenmetrazine, and an

Amphetamine Combination (Obetrol)", M.I. Berman, M.D., and I.R. Anderson, M.D.

24. Respondent's Exhibit AA: Article entitled "New Fat Facts--The Old Ones May Be Wearing Thin". B. Weiss, Drug Topics (11/17/86).

25. Respondent's Exhibit BB: Excerpt from unidentified source entitled "Nervous System Diencephalon", identified at hearing with reference to the function of the hypothalamus.

26. Respondent's Exhibit CC: Excerpt (pp. 1219-1227) entitled "Obesity", F.X. Pi-Sunyer, represented by Dr. Vaughn to be from a textbook of internal medicine by Cecil and Loeb (see Tr.III at 51-52).

27. Respondent's Exhibit DD: Handout entitled "Mayo Clinic Diet".

28. Respondent's Exhibit EE: Two-page excerpt from an article entitled "Arterial Hypertension", S. Oparil, represented by Dr. Vaughn to be from a textbook of internal medicine by Cecil and Loeb.

29. Respondent's Exhibit FF: Excerpts from Goodman and Gilman's The Pharmacological Basis of Therapeutics (7th Ed.), specifically: pp. 166-168, regarding amphetamine; and pp. 174-179 regarding therapeutic uses of sympathomimietic drugs.

30. Respondent's Exhibit GG: Samples of various history and physcial forms available on the market, introduced for comparative purposes (see Tr.III at 59-61).

31. Respondent's Exhibits HH and II: Two history and physical forms, represented by Dr. Vaughn as being samples of those used by two family practitioners in the Cincinnati area.

*Note: THE ABOVE EXHIBITS MARKED WITH AN ASTERISK (*) HAVE BEEN SEALED TO PROTECT PATIENT CONFIDENTIALITY.

V. Closing of Hearing Record

With the consent of both the State and the Respondent, the hearing record in this Matter was held open for an indefinite period to allow the Hearing Examiner time to obtain and review the transcripts of testimony and the massive volume of exhibits presented. The record was subsequently closed as of 5:00 P.M., February 1, 1990, by Entry of this Hearing Examiner dated January 18, 1990, a copy of which is hereby admitted to the record.

FINDINGS OF FACT

1. On September 5, 1986, the office of Mattie L. Vaughn, M.D., at 2249 Losantiville Avenue, Golf Manor, Ohio, was searched by state and local law enforcement officials pursuant to a serch warrant issued by the Hamilton County Municipal Court. During that search, numerous "pre-signed' prescriptions were found in or on the desks of various office staff members. These pre-signed prescriptions were written on prescription forms preprinted with Dr. Vaughn's DEA registration number, were signed by Dr. Vaughn, but were imcomplete in that patient names and addresses were missing and the prescriptions were undated. Such pre-signed prescriptions, for a total of approximately 5170 dosage units of various controlled substances and dangerous drugs (as that term is defined by Section 4729.02(D), Ohio Revised Code), were found as follows:

a. At the desk of one Mary Shelton, L.P.N.:

#Scripts	# Units/Drug/Description (*includes authorized refills)	Total Dosage Units
11	30 Adipex-P, Schedule IV stimulant anorectic	330
17	30 Ionomin, Schedule IV stimulant anorectic	510
5	*60 Dyazide, diuretic	300

14	30 Didrex 50mg.,Schedule III stimulant anorectic	420
5	60 Didrex 50mg.,Schedule III stimulant anorectic	300
3	30 Tenuate 75mg.,Schedule IV stimulant anorectic	90
5	15 Tenuate 75mg.,Schedule IV stimulant anorectic	45
11	30 Obetrol 20mg.Schedule II amphet. anorectic	330
1	30 Fastin, Schedule IV stimulant anorectic	30
	Total	2,355

b. At the desk of office staffer Victor Jones:

#Scripts	#Units/Drug/Description (*includes authorized refills)	Total Dosage Units
1	*60 Dyazide, diuretic	60

c. At the desk of Dr. Vaughn, some in envelopes labeled with the names of various office staffers:

6	60 Didrex 50mg,Schedule III stimulant anorectic	360
4	30 Didrex 50mg,Schedule III stimulant anorectic	120
13	*60 Dyazide, diuretic	780
2	30 Adipex-P,Schedule IV stimulant anorectic	60
1	35 Adipex-P,Schedule IV stimulant anorectic	35
30	15 Tenuate 75mg,Schedule IV stimulant anorectic	450
4	30 Tenuate 75mg,Schedule IV stimulant anorectic	120
11	30 Ionomin,Schedule IV stimulant anorectic	330
3	35 Ionomin,Schedule IV stimulant anorectic	105
12	30 Obetrol 20mg,Schedule II amphet. anorectic	360
1	35 Obetrol 20mg,Schedule II amphet. anorectic	35
	Total	2,755

These facts are established by the testimony of Agent Bruce Koehn (Deposition Tr. at 21-28, 37-44); the testimony of Patricia McMahan (Tr. I at 87-88); the tesitmony of Officer Richardson (Tr. I at 24-33); Koehn Exhibits #7, #9 through #16, #23 through #33; and State's Exhibit #12.

2. In addition to those prescriptions, approximately 10 pre-signed

blank prescriptions with DEA number were found at the desk of Mary Shelton, L.P.N.

These facts are established by Koehn Exhibit #7 and by the testimony of Patricia McMahan (Tr. I at 87-88).

3. Dr. Vaughn was not in her office while patients were being seen there on the morning of September 5, 1986. At the time the search warrant was executed, Dr. Vaughn's office was found to be in the charge of Mary Shelton, L.P.N. In Dr. Vaughn's absence, Ms. Shelton, with the assistance of one Victor Johnes, was assesssing, examining, and diagnosing patients, including, on that morning, at least nine new patients who had never been seen by Dr. Vaughn. In addition, in Dr. Vaughn's absence on the morning of September 5, 1986, her staff issued pre-signed prescriptions for the controlled substances Obetrol (Schdule II), Adipex-P (Schedule IV), Didrex (Schedule III), and Ionomin (Schedule IV), and the prescription drug Dyazide. Such prescriptions were issued to at least 29 patients, including the nine new patients who had never been seen by Dr. Vaughn.

Dr. Vaughn admitted at hearing that Mary Shelton had been in charge of the office on September 5, 1986, and that Ms. Shelton had performed "nursing assessments and examinations." However, Dr. Vaughn contended that she, rather that Ms. Shelton, had diagnosed the new patients seen that day. Dr. Vaughn stated that she had diagnosed those patients as being obese before they came to the office, based upon the weight, age, and height information taken by the receptionist when they called for appointments. It is noted that one of the new patients seen (see State's Exhibit #7, patient identifiable by initials P.A. for confidentiality purposes) is not on the appointment lists included in States Exhibit #13 for September 5, 1986.

These facts are established by the testimony of Agent Koehn (Deposition Tr. at 10-11); the testimony of Officer Richardson (Tr. I at 24-33); the testimony of Patricia McMahan (Tr. I at 82-85, 88); the testimony of Mary Ann Shelton (Tr. I at 143-145); the testimony of Ann Sala (Tr. II at 52-58; Tr. III at 35-39, 77-80); Koehn Exhibits #40A and $40B; and State's Exhibits #7, #8, #10, #13, and #37.

4. Dr. Vaughn denied that it was the custom of her office for an L.P.N. to be left in charge when new patients were scheduled. She claimed that her absence on the morning of the morning of September 5, 1986, was due to a personal emergency, and that her arrival at 1:32 P.M., 15 to 20 minutes after the law enforcement officials, was coincidence.

Nevertheless, Dr. Vaughn admitted that she was routinely absent from her office once or twice every other week. She claimed, however, that only follow-up patients were scheduled with Quincy Davis, her "physician's assistant", on those occasions. Rebuttal testimony established that Quincy Davis has never been registered as a physician's assistant to Dr. Vaughn. Furthermore, Dr. Vaughn's office ledgers (Koehn Exhibits #40A through $40E) indicate that both new patients and follow-up patients were seen at Dr. Vaughn's office on a regular basis.

These facts are established by the testimony of Dr. Vaughn (Tr. III at 35-39, 77-80); and the testimony of Penny McKenzie (Tr. III at 107-110).

5. Mary Ann Shelton, L.P.N., testified on behalf of the State with regard to her employment at Dr. Vaughn's office from May, 1986, through September 5, 1986. Her routine duties at Dr. Vaughn's office included doing histories and physicals on new patients and giving them prescriptions for medications, according to protocols established by Dr. Vaughn. Patients were treated on occasions when Dr. Vaughn was absent from the office a couple of days each week, but that she did not know why. There were occasions when she saw new patients whom Dr. Vaughn did not see. In Dr. Vaughn's absence, new patients received pre-signed prescriptions for Obetrol. Other employees also did patient assessments and gave prescriptions to patients, as did Dr. Vaughn when she was there. Ms. Shelton did not know the medical qualifications of Dr. Vaughn's seven or eight other employees, but believed that one Dorothy Welch was an R.N. and one Quincy David was a P.A. She did not know Ann Sala's position.

Each morning, Ms. Shelton would receive pre-signed prescriptions from

either Dr. Vaughn or, when Dr. Vaughn was absent, from Ann Sala. Those prescriptions were completed with the name of the medication, dosage instructions, and Dr. Vaughn's signature; however, the "top part" of the prescriptions were not filled out. Ms. Shelton would herself fill out the top part of the prescriptions and give them to patients she assessed. Ms. Shelton kept a tally of the types of drugs given to patients, for purposes of a daily comparison by Dr. Vaughn of the number of prescriptions given and the number remaining with the number Ms. Shelton had received that morning. Ms. Shelton's pre-signed prescriptions were kept in her desk drawer during the day.

Ms. Shelton stated that patients had to be at least twenty pounds over their ideal weight, according to a height-weight chart, to be accepted into Dr. Vaughn's diet program. After assessment, new patients were given a prescription for Obetrol, unless the patient "indicated otherwise." In addition, it was office procedure to give new patients a diet sheet, to refer them for blood work, and to encourage them to exercise. Patients were given prescriptions before lab results were received, and no follow-up was done to determine whether the patients actually want for the lab tests. If results were received, they were placed in the patients' files.

In the case of "follow-up" or "return" patients, weight and blood pressure were taken. If the patient had lost weight, that patient would be given a prescription for another month's supply of a diet medication. Medications were alternated, so that a patient would receive a prescription for Obetrol, a Schedule II amphetamine anorectic, only every other month, and a prescription for a Schedule III or Schedule IV stimulant anorectic in between.

Ms. Shelton estimated that an average of 60 to 70 patients per day were seen at Dr. Vaughn's office. Some days, particularly toward the weekend, would be busier than others. She spent approximately 15 minutes with each new patient she saw, and approximately 5 minutes with each return patient.

These facts are established by the testimony of Ms. Shelton (Tr.I at 133-154).

6. Ann Sala, who testified on behalf of Dr. Vaughn, was employed by Dr. Vaughn as an office manager and "health care assistant' from approximately 1981 through September, 1986. Ms. Sala, who is currently employed as a medical records clerk at a clinic, stated that she had been "in the health care system' for 33 to 35 years. Her duties at Dr. Vaughn's office included making appointments, checking patients in, ordering supplies, handling medical records, and assessing patients. According to Ms. Sala, assessments done by Dr. Vaughn's health care assistants consisted of taking patient's height, weight, blood pressure, and history. Although Dr. Vaughn was absent from the office once, sometimes twice, per week, only follow-up patients were scheduled with Quincy Davis, whom she believed to be both a P.A. and an L.P.N. Ms. Sala stated that it was office procedure for Dr. Vaughn to do most of the new patient physicals, though Quincy Davis did some.

Ms. Sala had often observed Dr. Vaughn checking appointments and patient charts and writing prescriptions in the evenings. Dr. Vaughn wrote and signed all prescriptions; however, name, address, and date were written in by the P.A., doctor, nurse, or health care assistant who "checked the patient in." Ms. Sala stated that pre-signed prescriptions were sometimes left for Quincy Davis or whoever was checking the patients, including, upon occasion, herself, Mary Shelton, and Bernadette Kidd. She believed that Ms. Kidd had worked as an assistant and receptionist for other physicians. Although one of the envelopes containing pre-signed prescriptions seized from Dr. Vaughn's desk had been labeled "Victor", Ms.Sala stated that Victor Jones shouldn't have been given pre-signed prescriptions.

These facts are established by the testimony of Ms. Sala (Tr. II at 144-195) and Koehn Exhibits #32 and $40A through #40E.

7. In early June, 1986, Dr. Vaughn was ordered to report to Ft, McCoy, Wisconsin, on June 7, 1986, for 15 days of active duty training in the Army Reserves. Dr. Vaughn testified that she had left a day or so ahead of time, and that her office had been closed during her absence. However, her office ledgers show that 60 follow-up patients were seen on June 6, 1986. Although no further ledger entries

were recorded until June 23, 1986, Dr. Vaughn's patient record for office employee Bernadette Kidd (Patient 1531) shows that a pre-signed prescription for 30 Obetrol 20mg. was issued to Ms. Kidd on June 15, 1986. Dr. Vaughn identified the chart notation of this prescription as being in Ms. Kidd's handwriting, and stated that she did not know how this could have occurred.

These facts are established by the testimony of Dr. Vaughn (Tr. III at 16-19, 111); the testimony of Ann Sala (Tr. II at 181-183); State's Exhibits #16 and #42; Respondent's Exhibits P, Q, R, and S; and Koehn Exhibits #40D and #40E.

8. Surveillance notes prepared by Board Investigator Patricia McMahan indicate that Dr. Vaughn was not in her office on July 18, 1986. An investigative report prepared by Police Office R.D. Richardson indicates that at least one patient received a prescription pre-signed by Dr. Vaughn for Didrex, a Schedule III controlled substance, on July 18, 1986, without having seen Dr. Vaughn. Further, a patient (identifiable by initials V.P. for confidentiality purposes) was seen on that same date by Ann Sala and was issued two separate prescriptions, each for 30 Didrex 50mg. Dr. Vaughns's office ledgers show that 32 new patients and 26 return patients were treated in her office on July 18, 1986. Dr. Vaughn did not recall her whereabouts on that day.

These facts are established by Koehn Exhibits #40A and #40D; State's Exhibits #6, #8, and #16; and the testimony of Dr. Vaughn (Tr. III at 104-105).

9. On August 21, 1986, one Marianne Lawrence went to Dr. Vaughn's office without an appointment, seeking treatment in Dr. Vaughn's weight-losss program. Ms. Lawrence testified that, upon entering the office, she was handed a billing form and a laboratory requisition form on which she wrote her name, address, and telephone number. However, she was then told that she could not be seen without a driver's license or other picture ID.

The next day, August 22, still without an appointment, Ms. Lawrence

returned with her driver's license. She observed that jewelry was displayed with prices in the reception area of Dr. Vaughn's office. On that occasion, she was told that it would cost $35.00 to see the doctor. She was handed two cards bearing maps to pharmacies, and was told to have any prescriptions she received filled there. She paid $35.00, recieved a receipt, and was seated in the waiting room. Although there were approximately 20 people in the waiting room, she waited less than half an hour before her name was called. She was taken to an examination room by a black woman (identified by Dr. Vaughn at hearing as Dorothy Welch, R.N.), who took her weight, pulse, blood pressure, respiration rate, and a brief history. She was then taken to a second examination room where she was seen by a white woman (identified by Dr. Vaughn at hearing as Dr. Yvonne Mohlman). Ms. Lawrence did not recall having had any further examination at that point, but she was asked about a previous surgery and types of diets she had tried. She then was told that her problem was obesity and was given prescriptions. No other problem was mentioned, including the mild hypertension noted in her chart (see Lawrence Exhibit #19). Ms. Lawrence stated that she was provided with no explanation of, nor literature pertaining to, a nutrition or diet program. She received a prescription pre-signed by Dr. Vaughn for 30 Obetrol 20mg., as well as a prescription written by Dr. Y. Mohlman on one of Dr. Vaughn's prescription forms for 15 HCTZ 50 mg., a diuretic. Ms. Lawrence did not know at the time whether or not she had seen Dr. Vaughn. Since no one had been introduced as a doctor, she assumed she hadn't seen one.

After her office visit, Ms. Lawrence felt that there had been something wrong with her visit to Dr. Vaughn's office in that it had appeared that jewelry was being sold at the office, she had been asked to pay up front, she had been asked to go to specific pharmacies with which she was not acquainted, she had received no detailed physical, she had been told to get lab work when she could, she had not been asked for a detailed medical history, she had received prescriptions signed by two different doctors, and she believed that she had not seen a doctor. Consequently, she contacted the Regional Enforcement Narcotics Unit (RENU) in Cincinnati. On or about August 26, 1986, Ms. Lawrence gave agent Bruce Koehn the receipt and the lab requisition form she

had received from Dr. Vaughn's office, as well as copies of the prescriptions she had been given. She stated that those were the only papers she had been given at Dr. Vaughn's office; she had not received a diet sheet.

It is noted that Dr. Vaughn indicated during the testimony of Mary Ann Shelton that Dr. Yvonne Mohlman had covered in Dr. Vaughn's office on only one occasion. She also indicated that other physicians had upon occasion covered her office in her absence. (see Tr. I at 152-153).

These facts are established by the testimony of Ms. Lawrence (Tr. I at 109-132). Koehn Exhibit #4, Lawrence Exhibits #18 and #19, and State's Exhibits #20 through #22).

10. Dr. Vaughn admitted that it was her usual practice during the time period in question that all first-time patients who weighed in excess of twenty pounds over their "ideal weight" be given prescriptions for 30 Obetrol 20 mg., a Schedule II controlled substance. Nevertheless, the definition of "obesity" she stated at hearing referred to individuals who were 20%, rather than 20lbs., over ideal weight (Tr. II at 46-47). It was also Dr. Vaughn's practice that the Obetrol be alternated with Schedule III or Schedule IV diet medications, so that patients who remained in her diet program received Obetrol only every other month. Such protocols enabled her to pre-write prescriptions for issuance by her office staff to both new and follow-up patients scheduled to be seen on a particular day. Patient names, addresses, and dates were left blank on the pre-signed prescriptions, to be completed after the patients were assessed. Dr. Vaughn did not personally assess all patients on occasions when her office staff issued them pre-signed prescriptions.

Dr. Vaughn contended that her procedures were both medically and legally sound. According to Dr. Vaughn, her first-time diet patients alway stated that they had tried caloric restriction without success, and she accepted their statements "on good faith." She stated that Obetrol was prescribed initially because of its "fewer side effects" and "effective appetite suppression"; however, it was alternated with other diet medications to reduce the likelihood of psychic addiction and

tolerance. Although Dr. Vaughn claimed that all diet medications were given in conjunction with a program of caloric restriction and exercise, the testimony of Marianne Lawrence indicated otherwise (see Finding of Fact #9, above). In view of the protocols she had established, Dr. Vaughn saw no problem with her office staff completing patient name, address, and date on prescriptions she had pre-signed, then giving them to patients. Although Dr. Vaughn admitted that she did not personally see all patients before they received her pre-signed prescriptions, she claimed that she had already diagnosed them as being "obese" or having "metabolic insufficiency." terms she defined as being synonymous. In the case of new information taken by telephone when appointments were made, to be verified by assessment. Dr. Vaughn admitted that her office staff sometimes, though rarely, saw patients without appointments.

These facts are established by the testimony of Dr. Vaughn (Tr. II at 46-50, 55-62; Tr. III at 36-42, 64-66, 76-77, 81-89, 114-115) and by Respondent's Exhibits U and W through FF.

11. During the September 5, 1986, search of Dr. Vaughn's office, large supplies of business cards from both Taft Rd. Pharmacy and Barrow's Apothecary were found in the reception area (see State's Exhibit #18 and #19). It was the practice of Dr. Vaughn's office to provide patients with the business cards of these two pharmacies and to direct them to fill prescriptions issued at her office there.

Although approximately 15 to 25 of Dr. Vaughn's patients filled their prescriptions at Barrow's Apothecary each day, no evidence was presented to indicate that Dr. Vaughn received any benefit from referring patients there. However, for each patient of Dr. Vaughn's who filled a prescription at Taft Rd. Pharmacy, Dr. Vaughn earned 50 "valupoints", which were redeemable for merchandise. Leo Okum, owner of Taft Rd. Pharmacy, testified that he issued "valupoint checks" to Dr. Vaughn generally on a monthly basis. According to Mr. Okum, the redemption value was approximately 12.5 cents per 50 points. During the search of Dr. Vaughn's office, two "valupoint checks were found in Dr. Vaughn's desk. One, dated August 2, 1986, was for 23,500 "value points", representing a volume of 506 patients and a

monetary value of approximately $63.25. the other, issued for April and May, 1986, was for 53,150 "valuepoints", representing a volume of 1,063 patients and a monetary value of approximately $132.88. It is noted that, while Mr. Okum testified that he had filled prescriptions for approximately 5 to 10 of Dr. Vaughn's patients per day, these "valuepoint checks" woud indicate an average of at least 17 per day.

Dr. Vaughn denied that she had ever redeemed any of these "valuepoints." Mr. Okum ws unable to recall whether Dr. Vaughn had paid her $602.68 account (see State's Exhibit #34) by "valuepoint", cash, or check. Ann Sala, Dr. Vaughn's office manager, recalled that she had once sent a payment of $200.00 to Taft Rd. Pharmacy.

These facts are established by the testimony of Marianne Lawrence (Tr. I at 112-113, 116-117, 130-132); the testimony of Leo Okum (Tr. II at 5-26); the testimony of Jack Barrow (Tr. II at 27-41); the testimony of Ann Sala (Tr. II at 166-168); the testimony of Dr. Vaughn (Tr. III at 42-45); and State's Exhibit's #20, #21, and #30 through #35.

12. Dr. Vaughn admittedly prescribed the controlled substances listed in the "Prescription List by Patient Number" identified as State's Exhibit #1A, on the dates and in the amounts indicated, to the patients who are named in the "Patient Number Key." This listing, prepared as a summary of the original prescriptions included in State's Exhibits #14 and # 15, does not represent the entirety of Dr.Voughn's prescribing for her diet patients. During an approximate one-year period from September 1, 1985, to September 19, 1986, approximately 4,449 patients were treated in Dr. Vaughn's diet program. Of these, at least 172 patients received three or more Obetrol prescriptions which, according to Dr. Vaughn's practice of prescribing on a monthy basis and alternating medications, would indicate that they were in her diet program for five or more months.

These facts are established by the testimony of Patricia McMahan (Tr. I at 71-73); the testimony of Dr. Vaughn (Tr. III at 45-46, 87-89, 117-118); and State's Exhibits #1A, #7, #8, #14, #15, #17, #39, #41A, #41B, and #42.

13. Steven William Jennings, M.D., testified on behalf of the State with regard to his review of Dr. Vaughn's patient records. Dr. Jennings, who is currently the Medical Director of the Sleep Disorders Center at Mercy Hospital, was formerly involved in the private practice of family medicine for over five years, with Board certification in family medicine following a three-year residency in that field. Dr. Jennings reviewed Dr.Vaughn's records for approximately 106 diet patients, including at least 55 of the 58 patients indicated by asterisks on the listing identified as State's Exhibit #39 (the records of Patients 1210, 1268, and 2804 were not included in State's Exhibits #41A and #41B).

Based upon his review of Dr. Vaughn's records, Dr. Jennings identified the following concerns with regard to Dr. Vaughn's care of these diet patients:

a. In nearly every case, patients received prescriptions for medication an their first office visit;

b. In nearly every case, there was inadequate evidence that an appropriate medical history, diet history, and family history had been taken, and that patients had been counseled with regard to specific behavior modification and dietary measures to be taken;

c. In nearly every case, there was inadequate evidence that an adequate physical assessment had been at the time of the initial office visit;

d. There was generally no indication of appropriate laboratory work, either at the time of the initial office visit or afterward, to support the diagnosis and treatment of "metabolic insufficiency";

e. In some cases, the prescribing of Obetrol continued where patients either failed to lose weight on Obetrol or lost weight on other appetite suppressants and gained weight on Obetrol;

f. Patiets were continued on appetite suppressant medication for

inappropriately long periods of time, often over three months;

g. In some cases, stimulant appetite suppressants were prescribed for patients who had elevated blood pressure readings;

h. In many cases, there wsa inadequate evidence that patients were not pregnant or at risk for pregnancy and, in one case, a patient became pregnant during the course of treatment;

i. In several cases, it could not be determined whether or not Dr. Vaughn had been part of the office visit experience even though prescriptions had been given.

Dr. Jennings acknowledged that there were different clinical and philosophical approaches to the treatment of obesity. However, in his opinion, even if it is deemed appropriate to utilize medication to suppress the appetite, such medication should be utilized only after thorough and comprehensive historical and physical evaluation of the patient. Further, there should first be documented evidence that the patient had been refractory to other forms of treatment, such as caloric restriction diets, dietary modifications, behavior modification, or even psychotherapy.

In Dr. Jenning's opinion, an appropriate history for a diet patient would include information about prior illnesses, prior state of health, significant medical occurrences, family history, and a specific dietary history encompassing eating patterns, specific habits that may be contributing, work and free-time patterns, and a history of what the individual's weight was at different developmental stages. Specific weight loss efforts must be documented. Merely accepting a patient's statement as to prior weight loss efforts would not be appropriate except in the case of an established patient to whom the physician had already made specific recommendations. Especially in the area of weight loss, individuals may not know what constitutes significant efforts; there is often misunderstanding about what comprises an appropriate diet, an appropriate mix of diet and exercise, and calorie balance. Even if the patient related specific measures, it would be necessary to find out how long they were tried, what the results were,

meal breakdown, activity level, and other significant details. No such dietary history appeared in Dr. Vaughn's records.

Dr. Jennings stated that, although patient histories might appropriately be taken by trained non-physician personnel, physical assessment by a physician is required for the proper diagnosis and treatment of obesity. Although an accepted definition of obesity is 20% over "ideal weight", the determination of ideal weight by reference to a standard height-weightchart requires a clinical judgment regarding frame size. Once significant overweight is established, the physician must determine whether it derives from excessive lean body weight, excessive muscle mass, or excessive fat deposits. Beyond that, fat distribution is significant because there are different implications in terms of health risk for people who have generalized overall obesity, as opposed to trunkal obesity or obesity above the waist, at the waist, or extended into hips. Such factors should be evaluated by the physician in diagnosing and making treatment decisions with regard to obesity. Moreover, because weight loss involves major physiological changes, the physician must adequately evaluate the cardiovascular system, the neurological system, the pulmonary system, and the gastrointestinal system. While a trained non-physician assistant may be qualified to obtain vital signs, height, weight, blood pressure, pulse, temperature, and respiratory rate, the physician must determine the competency and status of the major organ systems. Thorough physical assessment is especially important when stimulant medications, which can compound physiological changes, are prescribed. Despite Dr. Vaughn's routine prescribing of stimulant controlled substances for weight loss, her patient records failed to reflect thoroughphysical assessments or evaluations of diet patients.

Dr. Jenning noted that, with the exception of one patient with a prior hospitalization, there was no lab work available with regard to Dr. Vaughn's patients prior to the initiation of treatment with Obetrol for obesity or overweight. Often, though lab work was routinely ordered, there was no indication it was ever done. Dr. Jennings stated that some individuals have attendant problems with obesity, such as thyroid abnormality, blood sugar abnormality, elevated cholestrol and triglycerides, or elevated uric acid which could indicate an existing or

potential gout condition. A diet could effect an individual's blood sugar, the use of a stimulant medication could change the thyroid status, and the tissue breakdown involved with weight loss would increase the level of uric acid in the body. In addition to aiding assessment of such potential problems, laboratory studies would indicate whether marked curtailment in lipic or fat intake were needed. Therefore, it is important that the physician obtain appropriate lab work and evaluate it prior to initiating treatment for the significant problem of obesity. Dr. Jennings specifically noted that, in the case of Patient 3, treatment was initiated without lab results, even though that patient stated symptoms which suggested diabetes (overweight, excessive thirst, excessive urination). Further, although a glucose tolerance was ordered, Patient 3 was continued in the diet program with no evidence that lab results were ever obtained.

Dr. Jennings also stated that amphetamine and non-amphetamine appetite suppressants are not recommended for administration during pregnancy unless the risks outweigh the benefits. According to Dr. Jennings, some literature suggests that babies of women who take amphetamines early in the course of pregnancy have a higher incidence of cardiac defects and palate. In fact, one source suggested that women who use amphetamines within a period of 55 days before their last menstrual period have a higher incidence of those birth defects in their children. In Dr. Jennings' opinion, before giving any medication to a female patient 15 or more days after her last menstrual period, the physician should determine that the patient is either sexually inactive or practicing active birth control. He noted that Dr. Vaughn's record for Patient 1395 indicated that that patient conceived while she was receiving medication in Dr. Vaughn's diet program. The patient note for January 15, 1986, confirmed the pregnancy, but failed to indicate whether the patient had taken the prescription for 30 Obetrol 20 mg. she had received on December 18, 1985, or any other details pertinent to assessment of the risks of that mother and child.

With regard to Dr. Vaughn's prescribing of Obetrol 20 mg., a Schedule II amphetamine anorectic, Dr. Jennings indicated that safer and equally effective medications could have been used for the same purpose (see Finding of Fact #14, below). Furthermore, Dr. Vaughn's records

indicated that patients were continued on Obetrol even when they failed to lose weight or gained with on that medication. Although medications were alternated to get patients off of amphetamines at least a month at a time, patients were alternated back to Obetrol even when they had lost weight on the non-amphetamine mediation and gained weight on Obetrol. The patient records offered no explanation or justification for reinstituting the Schedule II medication in such cases.

Dr. Jennings also indicated that Dr. Vaughn's patients were maintained on Obetrol and other appetite suppressant drugs for inappropriately long periods of time. Such medications, if indicated, are recommended for only short-term use, generally from four to six weeks, in selected individuals (e.g., individuals with minor degrees of obesity; more significant obesity requires life-long behavioral change). According to Dr. Jennings, most individuals develop tolerance to appetite suppressants within a period of six to twelve weeks, and actual weight loss will taper off after six to eight weeks of therapy. Although such patterns were demonstrated by substantial number of Dr. Vaughn's patients (see State's Exhibit #40), they were nevertheless continued on appetit suppressant medications for periods of three or more months.

Dr. Jennings stated that stimulant anorectics, especially amphetamines, can raise pulse and blood pressure, and should be avoided in treatment of patients with even mild hypertension. Dr. Jennings emphasize that a diagnosis of hypertension could not be base upon an is located blood pressure reading. However, when a patient exhibits and elevated reading, the physician must be very cautious about prescribing stimulant medications. Further, if that patient has exhibited normal blood pressure readings on previous visits, the physician must be already to the possibility that the patient is abusing the medication by taking more than was prescribe. The physician should be concerned bout both absolute (systolic 140 or above, or diastolic 90 or above) and relative (30 or more points above the individual's normal systolic, or 15 or more points above the individual's normal diastolic) elevations. Upon obtaining such elevations, the physician should recheck the patient's blood pressure two or three times at intervals of a few days, at various times of day, to determine whether or not the elevations sustained, signifying either absolute or relative hypertension. Unless

it is established that the elevated pressure was a fluke, stimulant medications should be discontinued or given with caution after evaluation of benefits versus risks. Dr. Jennings cited several specific instances when patients of Dr. Vaughn had been given stimulant medications regardless of elevated blood pressure readings, including: Patient 2268, who was prescribed Obetrol upon her initial office visit despite a blood pressure reading of 180/86; Patient 266, who was prescribed stimulant medication on 9/11/86 despite a chart notation of mild hypertension based upon a blood pressure reading of 140/90;Patient 2885, who was prescribed Obetrol on 2/1/86 when she exhibited a blood pressure of 120/74 after several previous readings in the range of 90/60; and Patient 2937, who was prescribed Obetrol on 5/5/86 when she had a blood pressure reading of 140/90 after previous reading of 114/70 on 2/26/86 and 100/70 on 4/21/86.

Dr. Jennings noted that the patient records often failed to indicate by any notation, signature, or initial of Dr. Vaughn that Dr. Vaughn had participated in particular office visits; yet, patients had been issued prescriptions signed by Dr. Vaughn at those visits. Dr. Jennings stated that, in treating obesity or overweight, the physician must assure that width is lost in a metabolically appropriate way, with attention to the significant physicalogical changes and attendant risks, which may be compounded by the giving of medications with potential physiological effects and side effects. Thus, the physician must be involved in making clinical treatment decisions, rendering treatment, advising patients, and issuing prescriptions for any medication. That involvement should be reflected in the patient record. The giving of prescriptions pre-signed by Dr. Vaughn to patients who had not been seen by Dr. Vaughn would, in Dr. Jennings' opinion, constitute failure to conform to minimal standards of care for the practice of medicine in Ohio, failure to use reasonable care discrimination in the administration of drugs, and failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease.

These facts are established by the testimony of Dr. Jennings (Tr. II at 63-138); State's Exhibits 1A and #39 through #41B; and Respondent's Exhibits X, Y, EE, and FF.

14. According to the 1982 Physicians'-Desk Reference, the Schedule II amphetamine, Obetrol, is indicated for use in the treatment of exogenous obesity only as a "short-term (a few weeks) adjunct in a regimen of weight reduction based on caloric restriction, for patients refractory to alternative therapy, e.g. repeated diets, group programs, and other drugs." The limited usefulness of Obetrol should be weighed against elevation of systolic and diastolic blood pressures. The PDR not only indicates that tolerance to Obetrol's "anorectic" effects may develop, but also states: "AMPHETAMINES HAVE A HIGH POTENTIAL FOR ABUSE. THEY SHOULD THUS BE TRIED ONLY IN WEIGHT REDUCTION PROGRAMS FOR PATIENTS IN WHOM ALTERNATIVE THERAPY HAS BEEN INEFFECTIVE. ADMINISTRATION OF AMPHETAMINES FOR PROLONGED PERIODS OF TIME IN OBESITY MAY LEAD TO DRUG DEPENDENCE AND MUST BE AVOIDED. PARTICULAR ATTENTION SHOULD BE PAID TO THE POSSIBILITY OF SUBJECTS OBTAINING AMPHETAMINES FOR NON-THERAPEUTIC USE OR DISTRIBUTION TO OTHERS, AND THE DRUGS SHOULD BE PRESCRIBED OR DISPENSED SPARINGLY."

These facts are established by Respondent's Exhibit Y.

15. Dr. Vaughn offered an article from the Journal of the American Geriatrics Society (Respondent's Exhibit Z), to support her contention that Obetrol was "the medication of choice" for treatment of obesity in conjunction with a diet. Although this article, published in 1966, appears to indicate that Obetrol is more effective anorectic with fewer side effects than Phenmetraizie, it neither addresses the issue of abuse potential nor compares Obetrol with anorectic medications other than Phenmetrazine.

The testimony of Dr. Jennings indicated that other available anorectic medications, such as Tenuate (diethylpropion hydrocloride), were safer than Obetrol and equally effective. Morever, as Dr. Jennings pointed out, Dr. Vaughn's own patient records reflected instances when patients

were routinely alternated back to Obetrol even though they achieved greater weight loss on non-amphetamine medications.

These facts are established by the testimony of Dr. Vaughn (Tr. III at 32-34), Respondent's Exhibits X through Z, and the testimony of Dr. Jennings (Tr. II at 84-89, 120-123).

16. At hearing, Dr. Vaughn submitted letters from eleven individuals, commending her character, professional competence, and/or community involvement. However, none of those individuals indicated any first-hand knowledge of Dr. Vaughn's private practice, and Dr. Vaughn admitted that she had not made any of them specifically aware of the nature of the Board's charges against her.

    These facts are established by the testimony of Dr. Vaughn (Tr. III at 98-99) and Respondent's Exhibits E through O.

17. Stanley Broadnax, M.D., Health Commissioner for the City of Cincinnati since 1979, testified that he had known Dr. Vaughn since 1969, and had been her employer at the West End Health Center from approximately 1977 to 1979. About 1982 or 1983, Dr. Vaughn had also begun working part-time for the Cincinnati Health Department. Dr. Broadnax stated that Dr. Vaughn had been highly regarded by her patients and her employers. To his knowledge, there had been no problems with prescribing or other aspect of her practice during her employment. Dr. Broadnax admitted that he had no first-hand knowledge of Dr. Vaughn's private practice, and had never personally observed it. However, he offered the opinion that it would be appropriate for nurses or "physicians extenders" to assume responsibility for routine activities if protocols were in place. Upon

(17). cross-examination, Dr. Broadnax stated that he had no personal knowledge of a protocol which would permit the prescribing of amphetamines to patients for treatment of obesity when those patients had never been seen by the physician issuing the prescription.

These facts are established by the testimony of Dr. Broadnax (Tr.I at 50-67).

18. Dr. Vaughn moved her practice from Redding Road to Losantiville Avenue, Golf Kanor,in early June, 2986. Dr. Vaughn testified that, at that time, diet patients approximately 60% of her practice, and gynecology patients approximately 40%. However, Dr. Vaughn's office manager, Ann Sala, estimated (a "wild guess") that 85% of Dr. Vaughn's practice was diet and 15% gynecology in 1986. The testimony of Leo Okum and Jack Barrow indicated that most of the prescriptions filled for Dr. Vaughn's patients at Taft Rd. Pharmacy and Barrow's Apothecary were for diet medications. Mr. Okum, who had visited and observed Dr. Vaughn's practice, appeared to be under the impression that it was strictly a diet practice.

These facts are established by the testimony of Dr. Vaughn (Tr. II at 44-45); the testimony of Ann Sala (Tr II at 188-189); the testimony of Leo Okum (Tr. II at 7-8); and the testimony of Jack Barrow (Tr. II at 33-34).

CONCLUSIONS

1. The acts, conducts, and/or omissions of Mattie L. Vaughn, M.D., as set forth in Findings of Fact #1 through #15, above, constitute:

   a. "Failure to use reasonable care discrimination in the administration of drugs" and "failure to employ acceptable

scientific methods in the selection of drugs or other modalities for treatment of disease", as those clauses are used in Section 4731.22(B)(2), Ohio Revised Code;

b. "Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes", as that clause is used in Section 4731.22(B)(3), Ohio Revised Code; and

c. "A departure from, or the failure to conform to, minimal standards of are of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established",as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

The evidence in this Matter substantially shows that Dr. Vaughn routinely prescribed Obetrol, a schedule II amphetamine anorectic, and other stimulant controlled substance anorectic for treatment of overweight or obesity. Dr. Vaughn did not require that patients be obese by medical definition (20% over ideal wight), but accepted any adult who was 20 lbs. or more overweight for treatment in her "diet program." Dr. Vaughn initiated treatment with amphetamines upon patients' first visits, without first objectively establishing that the patients were refractory to other methods of weight loss, and with out performing adequate workups and evaluations. Dr. Vaughn's patient records are generally devoid of laboratory studies or any other evidence which would indicate that she made an effort to identify either etiological factors or problems which might be attendant with obesity and potentially exacerbated by wight loss. Often, patient records show that stimulant medications were prescribed to female patient without establishing that they were not pregnant or at risk for pregnancy. In one case, a patient apparently became pregnant during the course of her

treatment with amphetamines. In some cases, stimulant appetite suppressants were inappropriately prescribe for patients who have elevated blood pressure readings. Further, Dr. Vaughn often maintained patients on Obetrol and other stimulant anorectic for inappropriately long periods of time, many in excess of three months, regardless of whether or not any significant with loss was achieved. Although it was Dr. Vaughn's practice to alternate medications so that patients receive Obetrol even when they had gained while on Obetrol and/or had shown better response to non-amphetamine medications. it is apparent that Dr. Vaughn failed to exercise appropriate medical judgment in her treatment of diet patients, but rather blindly adhered to inadequate "protocols" which she had established. Such practice constitutes grounds for disciplinary action under each of the above provisions of law.

2. As set forth in Findings of Fact #1, #2, #5 through #8, #10, and #13, above, the testimony and evidence substantially show that it was Dr. Vaughn's practice to prepare pre-signed prescriptions for various controlled substances and dangerous drugs and to distribute them to member of the office staff for completion and issuance to patients. Dr. Vaughn sought to show that her practice entailed little risk of unauthorized diversion of prescriptions. She claimed not only that her office layout made it unlikely that patients could gain access to the pre-signed prescriptions, but also that her office policies and daily prescriptions monitoring procedures, would prevent unauthorized diversions by her staff. It is apparent, however, that Dr. Vaughn's procedures were not foolproof. As set forth in Finding of Fact #7, above, one of Dr. Vaughn's office staffers issued herself a prescription for Obetrol during a period when Dr. Vaughn's office was closed and Dr. Vaughn was out of town. Further, as set forth in Finding of Fact #8, above, another office staffer person, in Dr. Vaughn's absence, issued two separate prescriptions for 30 Didrex 50 mg. to one patient on the same date. As indicated in Findings of Fact #1 and #2 above, Dr. Vaughn on at

least one occasion entrusted one of her employees with pre-signed prescriptions for over 2,000 dosage units of controlled substances and dangerous drugs, as well as 10 pre-signed blank prescriptions, to be issued at that employee's discretion in Dr. Vaughn's absence. Clearly, such practices constitute:

a. "Failure to use reasonable care discrimination in the administration of drugs", as that clause is used in Section 4731.22(B)(2), Ohio Revised Code;

b. "Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes", as that clause is used in Section 4731.22 (B)(3), Ohio Revised Code; and

c. "A departure from, or the failure to conform to, minimal standards of are of similar practioners under the same or similar circumstances, whether or not actual injury to a patient is established", as that clause is used in Section 4731.22 (B)(6), Ohio Revised Code.

As set forth in Findings of Fact #3 through #10 and #13, above, the testimony and evidence substantially show that it was Dr. Vaughn's practice to authorize her non-physician office staff members, in her absence, to assess, examine, diagnose, and issue pre-signed prescriptions to both new an follow-up patients, act which constitute the practice of medicine pursuant to Section 4731.34, Ohio Revised Code. There is no merit in Dr. Vaughn's contention that she, rather than her office staff, diagnosed patients whom she did not personally see or examine. Although a tentative diagnosis might have been made by Dr. Vaughn prior to a patient's visit, such diagnosis could be confirmed only by the person who actually examined and assessed the patient. DR. Vaughn;s further contention, that such assessments and

initiations of treatments by her office staff were acceptable because they were done in accordance with "protocols" which she had established, is well-rebutted by the testimony of Dr. Steven William Jennings (see Finding of Fact #13). As Dr. Jennings pointed out, the diagnosis and treatment of obesity requires clinical judgments by a physicians. Certainly, the evidence establishes that Dr. Vaughn's "protocols" were inadequate, calling for rote prescribing for all diet patients without regard to variant problems and needs, and creating unnecessary risks to patients. Dr. Jennings cited instances where Dr. Vaughn's patients were issued prescriptions for stimulant medications despite elevated blood pressures and risks of pregnancy. Dr. Vaughn's providing of pre-signed prescriptions to her staff and her authorizing them to examine, diagnose, and treat diet patients in her absence constitutes:

a. "Permitting one's name or one's certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given", as that clause is used in Section 4731.22(B)(1), Ohio Revised Code;

b. "A departure from, or a failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established", as that clause is used in Section 4731.22(B)(6), Ohio Revised Code; and

c. "Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the Board", as that clause is used in Section 4731.22(B)(16), Ohio Revised Code (as in effect prior to March 7, 1987), to wit: Section 4731.41, Ohio Revised Code, Practice of Medicine or Surgery Without Certificate.

4. The acts, conduct, and/or omissions of Dr. Vaughn with regard to the referral of patients to Taft Rd. Pharmacy, as set forth in Findings of Fact #9 and #11,

> above, constitute "the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business", as that clause is used in Section 4731.22(b)(4), Ohio Revised Code.

The fact that Dr. Vaughn's office customarily provided patients with business cards from both Barrow's Apothecary and Taft Rd. Pharmacy would appear to be undisputed. However, the testimony conflicted as to whether or not it was the custom of Dr. Vaughn's office to direct patients to fill prescriptions they received from her office at one of those two pharmacies. Marianne Lawrence, who had gone to Dr. Vaughn's office as a patient, testified that she was so directed. On the other hand, Ann Sala, Dr. Vaughn's former office manager, indicated that patients were not specifically directed to fill their prescriptions there, but were provided business cards of the two pharmacies because they often did not know where to find the medications they were prescribed (Tr. II at 166-167). However, Ms. Sala also testified that Dr. Vaughn received no gratuities from either pharmacy, an assertion which is well-rebutted by substantial evidence. The testimony of Marianne Lawrence is specifically found to be the more credible on this issue.

Although there is no indication that Dr. Vaughn received anything of value in return for referring patients to Barrow's Apothecary, she received "valupoints," redeemable for merchandise, for each prescription her patients filled at Taft Rd. Pharmacy. Whether or not Dr. Vaughn actually redeemed these "valupoints" is irrelevant to the finding of violation of Section 4731.22(B)(4).

* * *

There would appear to be no significant mitigating factors in this case. The testimony of both Dr. Vaughn and Dr. Stanley Broadnax, as well as the letters of Dr. Vaughn's colleagues, indicate that Dr. Vaughn's conduct did not arise form lack of knowledge or training. At hearing, Dr. Vaughn expressed valid concerns about problems associated with obesity; however her care of diet patients failed to reflect appropriate concern for patient welfare. Instead of affording these overweight

patients individualized evaluation and care, she rotely prescribed them stimulant diet medications, without adequately addressing indications or contraindications. In fact, she established protocols involving the use of pre-signed prescriptions, so that her non-physician office staffers could and did treat patients in her absence. Patients were prescribed potentially addictive controlled substance medications for months in cases where such medications were obviously ineffective in helping them achieve any significant weight loss. Dr. Vaughn's conduct with regard to her treatment of diet patients demonstrates failure to exercise sound medical judgment. Moreover, Dr. Vaughn inappropriate delegations of patient care to her staff show a disregard for the responsibilities corollary to her privilege to practice medicine in this State.

PROPOSED ORDER

It is hereby ORDERED that the certificate of Mattie L. Vaughn, M.D., to practice medicine and surgery in the State of Ohio shall be and is hereby REVOKED.

This Order shall become effective thirty (30) days from the date of mailing of notification of approval by the State of Medical Board of Ohio, except that Dr. Vaughn shall immediately surrender her Drug Enforcement Administration certificate and shall not order, purchase, prescribed, dispense, administer, or possess any controlled substances, except for those prescribed for her personal use by another so authorized by law. In addition, Dr. Vaughn shall not in the interim undertake the care of any patient not already under her care.

/s/ Wanita J. Sage
Wanita J. Sage
Attorney Hearing Examiner

APPENDIX Q

THE SUPREME COURT OF OHIO

In the Matter of Mattie L. Vaughn, M.D.,	:	1996 TERM
	:	Case No. 96-117
Appellant,	:	RECONSIDERATION ENTRY (Franklin County)
v.	:	
The State Medical Board of Ohio,	:	FILED
	:	MAY 29, 1996
Appellee	:	MARCIA J. MENGEL CLERK, SUPREME COURT OF OHIO

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 95APE05645)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX R

RELEVANT PROPOSITIONS OF LAW RAISED BELOW BY THE PETITIONER IN THE SUPREME COURT OF OHIO

Proposition of Law No. I:

In a disciplinary proceeding before the State Medical Board, failure by the Board to observe that fundamental fairness essential to the very concept of justice constitutes a denial of the Constitutional right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 16 of the Ohio Constitution. [State, ex rel. Ormet Corp. v. Indust. Comm'n, 54 Ohio St. 3d 102 (1990) applied].

Proposition of Law No. 2:

The Due Process Clause of Article 1, Section 16 of the Ohio Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution guarantees a respondent in disciplinary proceedings before the State Medical Board, the right of allocution before the Board imposes a disciplinary sentence. [United States v. Alba Pagan, 33 F. 3d (1st Cir. 1994) approved].

Proposition of Law No. 4:

A disciplinary sanction imposed by the State Medical Board in a disciplinary proceeding is subject to judicial review under the Eighth Amendment to the United States Constitution and Article I Section 9 of the Ohio Constitution. [State v. Hill, 70 Ohio St. 3d 25 (1994); Austin v. United States, 113 S. Ct. 2801 (1993) applied].

APPENDIX S

RELEVANT ASSIGNMENTS OF ERROR RAISED BELOW
IN THE PETITIONER'S BRIEF IN THE
COURT OF APPEALS OF OHIO
AUGUST 17, 1995

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN AFFIRMING AUGUST 13, 1993 ORDER AND ENTRY OF THE STATE MEDICAL BOARD OF OHIO, SINCE THAT ORDER IN NOT "IN ACCORDANCE WITH LAW" AND THE MEDICAL BOARD'S PROCEEDINGS AND ACTION OF AUGUST 1993 VIOLATE DR. VAUGHN'S RIGHT TO DUE COURSE OF LAW AND DUE PROCESS OF LAW GUARANTEED BY ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION AND BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Board's Refusal To Hear Or Permit Dr. Vaughn To Present Mitigating Evidence Denied Her Due Process Of Law.

B. The Board's Refusal To Allow Dr. Vaughn To Testify On Her Own Behalf Also Denied Her Due Process Of Law.

C. The Board's Permanent Revocation Of Dr. Vaughn's Certificate To Practice Medicine Without Considering Mitigating Evidence

And Giving Dr. Vaughn An Opportunity To Speak On Her Own Behalf Is So Fundamentally Unfair As To Violate Her Constitutional Right To Due Process.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED, OR ABUSED ITS DISCRETION, TO THE PREJUDICE OF APPELLANT MATTIE L. VAUGHN, M.D., IN AFFIRMING THE AUGUST 13, 1993 ORDER AND ENTRY OF THE STATE MEDICAL BOARD, SINCE THAT ORDER IS NOT "IN ACCORDANCE WITH LAW" AND THE PENALTY OF PERMANENT REVOCATION OF THE APPELLANT'S CERTIFICATE TO PRACTICE MEDICINE, IMPOSED BY THAT ORDER, IS IMPROPER, UNLAWFUL, EXCESSIVE AND UNCONSTITUTIONAL.

A. The penalty Imposed Upon Dr. Vaughn Is Contrary To Law Since It Is Unduly Harsh And Unreasonable, And Violates The Prohibition Against Excessive And Cruel And Unusual Punishment Contained In The Eighth Amendment To The United States Constitution And Article 1, Section 9 Of The Ohio Constitution.

B. The Board's Imposition Of The Penalty Of Permanent Revocation Of Dr. Vaughn's Medical License Denied Her The Equal Protection Of The Law, In Violation Of Article I, Section 2 Of The Ohio Constitution.

APPENDIX T

RELEVANT FEDERAL QUESTIONS RAISED
BELOW IN THE PETITIONER'S BRIEF IN THE
COURT OF COMMON PLEAS
MAY 9, 1994

I.

THE MEDICAL BOARD'S PROCEEDINGS AND ACTION ON AUGUST 11-13, 1993 VIOLATED DR. VAUGHN'S RIGHT TO "DUE COURSE OF LAW" AND DUE PROCESS OF LAW GUARANTEED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Board's Refusal To Hear Or Permit Dr. Vaughn to Present Mitigating Evidence Denied Her Due Process Of Law.

B. The Board's Refusal To Allow Dr. Vaughn To Testify on Her Own Behalf Also Denied Her Due Process of Law.

C. The Board's Permanent Revocation Of Dr. Vaughn's License To Practice Medicine Without Considering Mitigating Evidence And Giving Dr. Vaughn An Opportunity To Speak On Her Own Behalf Is So Fundamentally Unfair As To Violate Her Right To Due Process.

* * *

III.

THE BOARD'S ORDER OF AUGUST 13, 1993 IS NOT "IN ACCORDANCE WITH LAW" SINCE THE PENALTY OF PERMANENT REVOCATION IMPOSED BY THE BOARD'S ORDER OF AUGUST 13, 1993 IS IMPROPER, UNLAWFUL AND EXCESSIVE.

A. The Severe Penalty Imposed Upon Dr. Vaughn Is Contrary To Law Since It Is Unduly Harsh And Unreasonable.

The Imposition of such a severe penalty violates Dr. Vaughn's rights guaranteed by the 8th Amendment to the U.S. Constitution and by Article I, Section 9 of the Ohio Constitution prohibiting "cruel and unusual" punishment. The protection of these constitutional provisions is not confined to "criminal proceedings", Ingraham v. Wright, 430 U.S. 688, (1977), but also applies to administrative adjudications.

APPENDIX U

RULE XI
RULES OF PRACTICE OF THE SUPREME COURT OF OHIO

RULE XI. MOTION FOR RECONSIDERATION; ISSUANCE OF MANDATE

Section 1. Motion for Reconsideration.

(A) A motion for reconsideration may be filed within 10 days after the announcement of the Supreme Court's decision. A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case, and may be filed only with respect to the following:

(1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal;

(2) The sua sponte dismissal of a claimed appeal of right as not involving a substantial constitutional question;

(3) The granting of a motion to dismiss;

(4) A decision on the merits of a case;

(5) The dismissal of an appeal as improvidently allowed pursuant to S. Ct. Prac. R. XIII.

(B) A motion for reconsideration relating to ineffective assistance of counsel in the Supreme Court may be filed more than 10 days after announcement of the Supreme Court's Decision. See State v. Murnahan (1992), 63 Ohio St.3d 60.

(C) An amicus curiae may not file a motion for reconsideration without prior leave of the Supreme Court.

(D) The Clerk shall refuse to file a motion for reconsideration that is not permitted by this rule or that is not timely.

Section 2. Memorandum Opposing Motion for Reconsideration. A party opposing reconsideration may file a memorandum opposing a motion for reconsideration withing seven days of the filing of the motion.

Section 3. Issuance of Mandate.

(A) After the Supreme Court has decided an appeal on the merits, the Clerk shall issue a mandate in conformity with the Supreme Court's judgment entry. The mandate shall be issued 10 days after the announcement of the merit decision, unless a motion for reconsideration is filed within that time in accordance with Section 1 of this rule.

(1) If a motion for reconsideration is timely filed but denied, the mandate shall be issued when the Supreme Court announces its denial of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed and granted, a mandate shall be issued in conformity with the Supreme Court's judgment entry is announced.

(B) No mandate shall be issued on the Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal or the dismissal of a claimed appeal of right as not involving a substantial constitutional question.

APPENDIX V

OHIO REVISED CODE

§ 119.12 Appeal by party adversely affected.

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license or registration of a license, or revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 [4301.25.2] of the Revised Code, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the conty in which the licensee is a resident, provided that appeals from decisions of the liquor control commission may be to the court of common pleas of Franklin County and appeals from decisions of the state medical board, chiropractic examining board, and board of nursing shall be to the court of common pleas of Franklin county. If any such party is not a resident of and has no place of business in this state, he may appeal to the court of common pleas of Franklin County.

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin County, except that appeals from orders of the fire marshall issued under Chapter 3737. of the Revised Code may be to the court of common pleas of the county in which the building of the aggrieved person is located.

This section does not apply to appeals from the department of taxation.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by the appellant with the court. Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided

in this section. For purposes of this paragraph, an order includes a determination appealed pursuant to division (C) of section 119.092 [119.09.2] of the Revised Code.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unsual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. If an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in tis section, such suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of a license or permit shall be denied by reason of such suspended order during the period of the appeal from the decision of the court of common pleas. In the case of an appeal from the state medical board or chiropractic examining board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. This provision shall not be construed to limit the factors the court may consider in determining whether to suspend an order of any other agency pending determination of an appeal.

The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of appeal.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the liquor control commission that suspends or revokes a permit issued under Chapter 4303. of the Revised Code, or that allows the payment of a forfeiture under section 4301.252 [4301.25.2] of the Revised Code, shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, even if the matter has not been finally adjudicated within that time.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board or chiropractic examining board that limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of such a certificate shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, or upon the rendering of a final decision or order in the appeal by the court of common pleas, whichever occurs first.

Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. Such record shall be prepared and transcribed and the expense of it shall be taxed as a part of the costs of the appeal. The appellant shall provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and copy of the complete record.

Notwithstanding any other provision of this section, any party desiring to appeal an order or decision of the state personnel board of review shall, at the time of filing a notice of appeal with the board, provide a security deposit in an amounty and manner prescribed in rules that the board shall adopt in accordance with this chapter. In addition, the board is not required to prepare or transcribe the record of any of its proceedings unless the appellant has provided the deposit described above. The failure of the board to prepare or transcribe a record for an appellant who has not provided a security deposit shall not cause a court to enter a finding adverse to the board.

Unless otherwise provided by law, in the hearing of the appeal,

the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on such appeal and shall give preference toall proceedings under sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. An appeal from an order of the state medical board issued pursuant to division (D) of section 4731.22 of the Revised Code or the chiropractic examining board issued pursuant to section 4734.101 [4734.10.1] of the Revised Code shall be set down for hearing at the earliest possible time and takes precedence over all other actions. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request or the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party,other than an agency, in an appeal filed pursuant to this section.

The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken either by the party or the agency, shall proceed as in the case of appeals in civil actions, and shall be pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. Such appeal by the agency shall be taken

on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record.

The court shall certify its judgment to such agency or take such other action necessary to give its judgment effect.

APPENDIX W

Ohio Revised Code § 4731.22

Grounds for discipline.

(A) The state medical board, pursuant to an adjudicatory hearing under Chapter 119. of the Revised Code and by a vote of not fewer than six of its members, may revoke or may refuse to grant a certificate to a person found by the board to have committed fraud in passing the examination or to have committed fraud, misrepresentation, or deception in applying for or securing any license or certificate issued by the board.

(B) The board, pursuant to an adjudicatory hearing under Chapter 119. of the Revised Code and by a vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(1) Permitting one's name or one's certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given;

(2) Failure to use reasonable care discrimination in the administration of drugs, or failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease;

(3) Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes or a plea of guilty to, or a judicial finding of guilt of, a violation of any federal or state law regulating the possession, distribution, or use of any drug;

(4) Willfully betraying a professional confidence or engaging in the division of fees for referral of patients, or the receiving of a thing

of value in return for a specific referral of a patient to utilize a particular service or business. For purposes of this division, "willfully betraying a professional confidence" does not include the making of a report of an employee's use of a drug of abuse, or a report of a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee as described in division (B) of section 2305.33 of the Revised Code, and nothing in this division affects, or shall be construed as affecting, the immunity from civil liability conferred by that section upon a physician who makes either type of report in accordance with division (B) of that section. As used in this division, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(5) Soliciting patients or publishing a false, fraudulent, deceptive, or misleading statement.

As used in this division, "false, fraudulent, deceptive, or misleading statement" means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

(6) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established;

(7) Representing, with the purpose of obtaining compensation or other advantage for self or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured;

(8) The obtaining of, or attempting to obtain, money or anything of value by fraudulent misrepresentations in the course of practice;

(9) A plea of guilty to, or a judicial finding of guilt of, a

felony;

(10) Commission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act was committed;

(11) A plea of guilty to, or a judicial finding of guilt of, a misdemeanor committed in the course of practice;

(12) Commission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act was committed in the course of practice;

(13) A plea of guilty to, or a judicial finding of guilt of, a misdemeanor involving moral turpitude;

(14) Commission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude;

(15) Violation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued;

(16) Failure to pay license renewal fees specified in this chapter;

(17) Any division of fees or charges, or any agreement or arrangement to share fees or charges, made by any person licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatry with any other person so licensed, or with any other person;

(18)(a) The violation of any provision of a code of ethics of the American medical association, the American osteopathic association, the American podiatric medical association, and any other national professional organizations as are determined, by rule, by the state medical board. The state medical board shall obtain and keep on file current copies of the codes of ethics of the various national professional organizations. The practitioner whose certificate is being suspended or

revoked shall not be found to have violated any provision of a code of ethics of an organization not appropriate to the practitioner's profession.

(b) For purposes of this division, a "provision of a code of ethics of a national professional organization" does not include any provision of a code of ethics of a specified national professional organization that would preclude the making of a report by a physician of an employee's use of a drug of abuse, or of a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee as described in division (B) of section 2305.33 of the Revised Code, and nothing in this division affects, or shall be construed as affecting, the immunity from civil liability conferred by that section upon a physician who makes either type of report in accordance with division (B) of that section. As used in this division, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(19) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that adversely affects cognitive, motor, or perceptive skills. In enforcing this division, the board, upon a showing of a possible violation, may compel any individual licensed or certified to practice by this chapter or who has applied for licensure or certification pursuant to this chapter to submit to a mental or physical examination, or both, as required by and at the expense of the board. Failure of any individual to submit to a mental or physical examination when directed constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board finds a physician unable to practice because of the reasons set forth in this division, the board shall require the physician to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for initial, continued, reinstated, or renewed licensure to practice. An individual licensed by this chapter affected under this division shall be afforded an opportunity to demonstrate to the board that the individual can

resume practice in compliance with acceptable and prevailing standards under the provisions of the individual's certificate. For the purpose of this division, any individual licensed or certified to practice by this chapter accepts the privilege of practicing in this state, and by so doing or by the making and filing of a registration or application to practice in this state, shall be deemed to have given consent to submit to a mental or physical examination when directed to do so in writing by the board, and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

(20) Except as provided in division (B)(27) of this section and section 4731.225 [4731.22.5] of the Revised Code, violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board. This division does not apply to a violation or attempted violation of, assisting in or abetting the violation of, or a conspiracy to violate, any provision of this chapter or any rule promulgated by the board that would preclude the making of a report by a physician of an employee's use of a drug of abuse, or of a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee as described in division (B) of section 2305.33 of the Revised Code, and nothing in this division affects, or shall be construed as affecting, the immunity from civil liability conferred by that section upon a physician who makes either type of report in accordance with division (B) of that section. As used in this division, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(21) The violation of any abortion rule adopted by the public health council pursuant to section 3701.341 [3701.34.1] of the Revised Code;

(22) The limitation, revocation, or suspension by another state of a license or certificate to practice issued by the proper licensing authority of that state, the refusal to license, register, or reinstate an applicant by that authority, the imposition of probation by that authority, or the issuance of an order of censure or other reprimand by

that authority for any reason, other than nonpayment of fees;

(23) The violation of section 2919.12 of the Revised Code or the performance or inducement of an abortion upon a pregnant woman with actual knowledge that the conditions specified in division (B) of section 2317.56 of the Revised Code have not been satisfied or with a heedless indifference as to whether those conditions have been satisfied, unless an affirmative defense as specified in division (H)(2) of that section would apply in a civil action authorized by division (H)(1) of that section;

(24) The revocation, suspension, restriction, reduction, or termination of clinical privileges by the department of defense, or the veterans administration of the United States, for any act or acts that would also constitute a violation of this chapter;

(25) Termination or suspension from medicare or medicaid programs by the department of health and human services or other responsible agency for any act or acts that would also constitute a violation of division (B)(2), (3), (6), (8), or (19) of this section;

(26) Impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice.

For the purposes of this division, any individual licensed or certified under this chapter accepts the privilege of practicing in this state subject to supervision by the board. By filing a registration or application for licensure or by holding a license or certificate under this chapter, an individual shall be deemed to have given consent to submit to a mental or physical examination when ordered to do so by the board in writing, and to have waived all objections to the admissibility of testimony or examination reports that constitute privileged communications.

If it has reason to believe that any individual licensed or certified under this chapter or any applicant for a license or

certification suffers such impairment, the board may compel the individual to submit to a mental or physical examination, or both. The examination shall be at the expense of the board. Any mental or physical examination required under this division shall be undertaken by a treatment provider or physician qualified to conduct such examination and chosen by the board.

Failure of the individual to submit to a mental or physical examination ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board determines that the individual's ability to practice is impaired, the board shall suspend the individual's certificate or deny the individual's application and shall require the individual, as a condition for initial, continued, reinstated, or renewed licensure to practice, to submit to treatment.

Before being eligible to apply for reinstatement of a license suspended under this division, the practitioner shall demonstrate to the board that the practitioner can resume practice in compliance with acceptable and prevailing standards of care under the provisions of the practitioner's certificate. Such demonstration shall include, but shall not be limited to, the following:

(a) Certification from a treatment provider approved under section 4731.25 of the Revised Code that the practitioner has successfully completed any required inpatient treatment;

(b) Evidence of continuing full compliance with an aftercare contract or consent agreement;

(c) Two written reports indicating that the individual's ability to practice has been assessed and that the individual has been found capable of practicing according to acceptable and prevailing standards of care. The reports shall be made by individuals or providers approved by the board for making such assessments and shall describe the basis for this determination.

The board may reinstate a license suspended under this division after such demonstration and after the individual has entered into a written consent agreement.

When the impaired practitioner resumes practice after reinstatement of the practitioner's license, the board shall require continued monitoring of the practitioner, which shall include, but not be limited to, compliance with the written consent agreement entered into before reinstatement or with conditions imposed by board order after a hearing, and, upon termination of the consent agreement, submission to the board for at least two years of annual written progress reports made under penalty of perjury stating whether the practitioner has maintained sobriety.

(27) A second or subsequent violation of section 4731.66 or 4731.69 of the Revised Code;

(28) Except as provided in division (I) of this section:

(a) Waiving the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers the practitioner's services, would otherwise be required to pay if the waiver is used as an enticement to a patient or group of patients to receive health care services from that provider.

(b) Advertising that the practitioner will waive the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers the practitioner's services, would otherwise be required to pay.

(29) Failure to use universal blood and body fluid precautions established by rules adopted under section 4731.051 [4731.05.1] of the Revised Code.

(30) Failure of a collaborating physician to perform the responsibilities agreed to by the physician in the protocol established between the physician and an advanced practice nurse in accordance

with section 4723.56 of the Revised Code;

(31) Failure to provide notice to, and receive acknowledgment of the notice from, a patient when required by section 4731.143 [4731.14.3] of the Revised Code prior to providing nonemergency professional services, or failure to maintain that notice in the patient's file.

(32) Failure of a physician supervising a physician assistant to maintain supervision in accordance with the requirements of Chapter 4730. of the Revised Code and the rules adopted under that chapter.

For purposes of divisions (B)(10), (12), and (14) of this section, the commission of the act may be established by a finding by the board, pursuant to an adjudicatory hearing under Chapter 119. of the Revised Code, that the applicant or certificate holder committed the act in question. The board shall have no jurisdiction under these divisions in cases where the trial court renders a final judgment in the certificate holder's favor and that judgment is based upon an adjudication on the merits. The board shall have jurisdiction under these divisions in cases where the trial court issues an order of dismissal upon technical or procedural grounds.

The sealing of conviction records shall have no effect upon a prior board order entered under the provisions of this section or upon the board's jurisdiction to take action under the provisions of this section if a notice of opportunity for hearing has been issued based upon conviction, a plea of guilty, or a judicial finding of guilt prior to such court order.

(C)(1) The board shall investigate evidence that appears to show that any person has violated any provision of this chapter or any rule adopted under it. Any person may report to the board in a signed writing any information that the person may have that appears to show a violation of any provision of this chapter or any rule adopted under it. In the absence of bad faith, any person who reports such information or who testifies before the board in any adjudication hearing conducted under Chapter 119. of the Revised Code shall not be liable for civil

damages as a result of the report or testimony.

Each complaint or allegation of a violation received by the board shall be assigned a case number and shall be recorded by the board. Information received by the board pursuant to an investigation shall be confidential and not subject to discovery in any civil action.

Investigations of alleged violations of this chapter or any rule adopted under it shall be supervised by the supervising member elected by the board in accordance with section 4731.02 of the Revised Code and by the secretary as provided in section 4731.39 of the Revised Code. The president may designate another member of the board to supervise the investigation in place of the supervising member. No member of the board who supervises the investigation of a case shall participate in further adjudication of the case.

For the purpose of investigation of a possible violation of division (B)(3), (8), (9), (11), or (15) of this section, the board may administer oaths, order the taking of depositions, issue subpoenas, and compel the attendance of witnesses and production of books, accounts, papers, records, documents, and testimony.

In investigating possible violations of all remaining divisions of this section and sections of this chapter or any rule adopted under this chapter, the board also may administer oaths, order the taking of depositions, issue subpoenas, and compel the attendance of witnesses and production of books, accounts, papers, records, documents, and testimony. However, in such instances, other than for patient records provided to the board pursuant to the reporting provisions of division (A) of section 4731.224 [4731.22.4] of the Revised Code, a subpoena for patient record information shall not be issued without consultation with the attorney general's office and approval of the secretary of the board, the supervising member, and a member of the board who holds a certificate issued under this chapter authorizing the practice of medicine and surgery, osteopathic medicine and surgery, or podiatry. Before issuance of such subpoena, the three board members shall determine whether there is probable cause to believe that the complaint filed alleges a violation of this chapter or any rule adopted under it,

and that the records sought are relevant to the alleged violation and material to the investigation. Such records must cover a reasonable period of time surrounding the alleged violation. Upon failure to comply with any subpoena issued by the board and after reasonable notice to the person being subpoenaed, the board may move for an order compelling the production of persons or records pursuant to the Rules of Civil Procedure. Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the board, shall receive the fees and mileage provided for witnesses in civil cases in the courts of common pleas.

All hearings and investigations of the board shall be considered civil actions for the purposes of section 2305.251 [2305.25.1] of the Revised Code.

The board shall conduct all investigations and proceedings in such a manner as to protect patient confidentiality. The board shall not make public names or other identifying information about patients unless proper consent is given or a waiver of the patient privilege exists under division (B) of section 2317.02 of the Revised Code, except that no such consent or waiver is required if the board possesses reliable and substantial evidence that no bona fide physician-patient relationship exists.

(2) In the absence of fraud or bad faith, neither the board nor any current or former member, agent, representative, or employee of the board shall be held liable in damages to any person as the result of any act, omission, proceeding, conduct, or decision related to official duties undertaken or performed pursuant to this chapter. If a current or former member, agent, representative, or employee requests the state to defend against any claim or action arising out of any act, omission, proceeding, conduct, or decision related to the person's official duties, and if the request is made in writing at a reasonable time before trial and the person requesting defense cooperates in good faith in the defense of the claim or action, the state shall provide and pay for such defense and shall pay any resulting judgment, compromise, or settlement. At no time shall the state pay that part of a claim or

judgment which is for punitive or exemplary damages.

(3) On a quarterly basis, the board shall prepare a report that documents the disposition of all cases during the preceding three months. The report shall contain the following information for each case with which the board has completed its activities:

(a) The case number assigned to the complaint or alleged violation pursuant to division (C)(1) of this section;

(b) The type of license or certificate to practice, if any, held by the individual against whom the complaint is directed;

(c) A description of the allegations contained in the complaint;

(d) The disposition of the case.

The report shall state how many cases are still pending, and shall be prepared in such a manner as to protect the identity of each person involved in each case. The report shall be a public record under section 149.43 of the Revised Code.

(D) If the secretary and supervising member determine that there is clear and convincing evidence that a certificate holder has violated division (B) of this section and that the certificate holder's continued practice presents a danger of immediate and serious harm to the public, they may recommend that the board suspend the certificate holder's certificate without a prior hearing. Written allegations shall be prepared for consideration by the board members.

The board, upon review of those allegations and by a vote of not fewer than six of its members, excluding the secretary and supervising member, may suspend a certificate without a prior hearing. A telephone conference call may be utilized for reviewing the allegations and taking such a vote.

The board shall issue a written order of suspension by certified mail or in person in accordance with section 119.07 of the Revised

Code. Such order shall not be subject to suspension by the court during pendency of any appeal filed under section 119.12 of the Revised Code. If the certificate holder requests an adjudicatory hearing by the board, the date set for such hearing shall be within fifteen days, but not earlier than seven days, after the certificate holder has requested a hearing, unless otherwise agreed to by both the board and the certificate holder.

Any summary suspension imposed under this division shall remain in effect, unless reversed on appeal, until a final adjudicative order issued by the board pursuant to this section and Chapter 119. of the Revised Code becomes effective. The board shall issue its final adjudicative order within sixty days after completion of its hearing. A failure to issue the order within sixty days shall result in dissolution of the summary suspension order, but shall not invalidate any subsequent, final adjudicative order.

(E) If the board should take action under division (B)(9), (11), or (13) of this section, and the conviction, judicial finding of guilt, or guilty plea is overturned on appeal, upon exhaustion of the criminal appeal, a petition for reconsideration of the order may be filed with the board along with appropriate court documents. Upon receipt of such petition and supporting court documents, the board shall reinstate the petitioner's certificate. The board may then hold an adjudicatory hearing to determine whether the applicant or certificate holder committed the act in question. Notice of opportunity for hearing shall be given in accordance with Chapter 119. of the Revised Code. If the board finds, pursuant to a hearing held under this division, that the applicant or certificate holder committed the act, or if no hearing is requested, it may order any of the sanctions identified under division (B) of this section. The board shall have no jurisdiction under division (B)(10), (12), or (14) of this section in cases where the trial court renders a final judgment in the certificate holder's favor and that judgment is based upon an adjudication on the merits. The board shall have jurisdiction under those divisions in cases where the trial court issues an order of dismissal upon technical or procedural grounds.

(F) The certificate or license issued to an individual under this

chapter and the individual's practice in this state are automatically suspended as of the date the individual pleads guilty to, is found by a judge or jury to be guilty of, or is subject to a judicial finding of eligibility for treatment in lieu of conviction for either of the following:

(1) In this state, aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary;

(2) In another jurisdiction, any criminal offense substantially equivalent to those specified in division (F)(1) of this section.

Continued practice after suspension of the individual's certificate or license shall be considered practicing without a certificate or license. The board shall notify the individual subject to the suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. If an individual whose certificate or license is suspended under this division fails to make a timely request for an adjudicatory hearing, the board shall enter a final order revoking the certificate or license.

(G) Any action taken by the board under division (B) of this section resulting in a suspension from practice shall be accompanied by a written statement of the conditions under which the certificate holder may be reinstated to practice. The board shall adopt rules governing conditions to be imposed for reinstatement. Reinstatement of a certificate suspended pursuant to division (B) of this section requires an affirmative vote of not fewer than six members of the board.

(H) Notwithstanding any other provision of the Revised Code, no surrender of a license or certificate issued under this chapter shall be effective unless or until accepted by the board. Reinstatement of a certificate surrendered to the board requires an affirmative vote of not fewer than six members of the board.

Notwithstanding any other provision of the Revised Code, no application for a license or certificate made under the provisions of this

chapter may be withdrawn without approval of the board.

(I) Sanctions shall not be imposed under division (B)(28) of this section against any person who waives deductibles and copayments as follows:

(1) In compliance with the health benefit plan that expressly allows such a practice. Waiver of the deductibles or copayments shall be made only with the full knowledge and consent of the plan purchaser, payer, and third-party administrator. Documentation of the consent shall be made available to the board upon request.

(2) For professional services rendered to any other person authorized to practice pursuant to this chapter, to the extent allowed by this chapter and rules adopted by the board.

APPENDIX X

STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor,
Columbus, Ohio 43266-0315 (614) 466-3934

Excerpt From The Minutes of August 11, 1993

Remand In The Matter of Mattie L. Vaughn, M.D.

Dr. Agresta announced that the Board would now consider the Remand Order in the matter of Mattie L. Vaughn, M.D.

Dr. Agresta asked whether each member of the Board had received, read, and considered the hearing record, the proposed findings, conclusions, and order, and any objections filed in the matter of Mattie L. Vaughn, M.D.

A roll call was taken:

Roll Call:
Mr. Albert -aye
Dr. Stephens -aye
Dr. Gretchen -aye
Dr. Gretter -aye
Dr. Heidt -aye
Dr. Buchan -aye
Dr. Garg -aye
Ms. Noble -aye
Dr. Steinbergh-aye
Dr. Agresta -aye

Dr. Agresta asked whether each member of the Board understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

Roll Call: Mr. Albert -aye

Dr. Stephens -aye
Dr. Gretchen -aye
Dr. Gretter -aye
Dr. Heidt -aye
Dr. Buchan -aye
Dr. Garg -aye
Ms. Noble -aye
Dr. Steinbergh-aye
Dr. Agresta -aye

In accordance with the provision in Section 4731.22(C)(1), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of this matter.

The original Reports and Recommendations shall continue to be maintained in the exhibits section of this journal.

Dr. Agresta advised that this matter has been remanded to the Board by the court of Common Pleas of Franklin county for a disciplinary hearing or a finding consistent with the Court's Order following a judgment by the Court affirming the Board's Order on all of its findings, with the exception of the Section 4731.22(B)(4) violation. He noted that Dr. Cramblett was Secretary in this case and Dr. Rauch war Supervising Member. The following members of the Board voted to adopt the original Findings, Conclusions and Order in the Matter of Mattie L. Vaughn, M.D.: Dr. Gretter, Dr. Stephens, Mr. Jost, Dr. Ross, Mr. Albert, Ms. Rolfes, and Dr. Agresta.

Dr. Agresta continued that a motion for remand has been filed by Dr. Vaughn's attorney, Thomas L. Henderson, Esq.

Mr. Henderson at this time stated that he was present and prepared to make a statement to the Board or answer questions the Board may have.

DR. GARG MOVED TO GRANT MR. HENDERSON'S MOTION TO REMAND THE MATTER TO THE HEARING OFFICER. MS. NOBLE SECONDED THE MOTION.

Dr. Gretter stated that Mr. Henderson's motion speaks of new and mitigating evidence. He asked whether the evidence is newly obtained since the time of the hearing, or whether it was available at the time of the hearing.

Mr. Henderson stated that, specifically, this matter commenced in 1986 with the Board's citation letter to Dr. Vaughn. A significant amount of time has passed since then. It is important for the Board to be aware of Dr. Vaughn's activities subsequent to the charge letter of 1986, as well as before 1986. For example,there are fewer violations before the Board now pursuant to the Court's decision. In light of the fact that there are fewer violations before the Board-specifically the court of Appeals having determined that Dr. Vaughn did not receive a thing of value for referring patients to particular pharmacists-it may be important to consider certain mitigating factors such as Dr. Vaughn's conduct subsequent to the violations.

Mr. Henderson added that it is also important to note that at the original proceeding Dr. Vaughn was not represented by counsel. Mr. Henderson stated that it is not his intention to retry the whole case, but to put forth Dr. Vaughn's side of the story in a manner which might be more concise than was originally done.

Dr. Agresta asked whether the Assistant Attorney General wished to respond.

Ms. Berry stated that she had discussed this matter at length with Mr. Henderson over the last few days, and she doesn't have a problem with the Board's remanding it for the purpose of hearing mitigating evidence as to changes Dr. Vaughn has made in her practice. Ms. Berry noted that Dr. Vaughn has continued to practice during court order stays of the Boards revocation order. She noted that in recent cases at least one court has informed the Board that it should take such evidence under consideration. Ms. Berry commented that the Board

has appealed that decision, and the circumstances are not precisely the same as those in Dr. Vaughn's case, but in the interim she doesn't have a problem with hearing evidence offered in mitigation in the hearing setting.

She continued that she does have a problem with testimony being presented on the original charges. All but one of the Board's charges were upheld by the courts. The only charge the Court did not uphold was that of violation of Section 4731.22(B)(4), Ohio Revised Code, i.e., "the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business." Ms. Berry stated that she would object in a remand hearing to any efforts to retry the original charges. The Board can hear whatever Dr. Vaughn has to say in mitigation. Following that hearing, the Hearing Officer would issue another Report and Recommendation, at which time the Board could choose any Order it considered appropriate. The Court has not said that the original Order cannot be imposed, but only that the Board should consider the change in findings before determining what the Order should be.

Dr. Steinbergh inquired concerning the length of time it will take if the Board remands the matter. She stated that she is amazed at the amount of time that Dr. Vaughn has been permitted to continue to practice.

Ms. Berry state that the remand hearing could be held in the very near future.

Mr. Bumgarner stated that the average length of time from initiation until the Board receives the Report and Recommendation is 90 plus days.

Dr. Gretter spoke against the motion to remand, stating that in 1990 the Board based its decision to revoke Dr. Vaughn's license on four things: her prescribing without performing appropriate examinations of patients; her having pre-signed prescriptions available for use by her office staff; allowing her office staff to engage in the incentive for sending her patients there. The Court reversed the Board on the final aspect, state that it did not feel there was significant evidence to

support the Board's finding on that charge. Dr. Vaughn did receive the "valupoints", but there was no evidence in the record that she ever redeemed them.

Dr. Grette stated that the facts as to the other three matters have been established. Dr. Gretter stated the he didn't think it would do any good to remand this case at this point.

Mr. Bumgarner state that the Board members need to look at whether they feel there is evidence that could serve to mitigate in this case. If members believe there is, it would be appropriate to remand. If not, a remand would be unnecessary.

Dr. Gretter commented that the courts in reviewing this case noted that Dr. Vaughn was not represented by counsel, and that made no difference to the courts. She seemed to represent herself quite well.

Mr. Henderson stated that he would take issue with that point. In the most recent Judgment Entry remanding this matter back to the Board, Judge Reese states that he's remanding it back for a disciplinary hearing and/or a finding consistent with the Court's Order and the Appellate Court's decision. Mr. Henderson stated that he believes that the Judge contemplated something more than a cursory review of the very cold and very old record. This was contemplated not only by the trial court, but also by the court of Appeals, both of which entered lengthy opinions. Mr. Henderson stated that demonstrated ability to practice without incident for a period of years in a clinical practice where the doctor sees 40 to 50 patients per day is of some significance and relevance to the Board's making a fair disciplinary determination.

Dr. Stephens called the question.

Dr. Gretter stated that in 1990 he spent a lot of time reading the materials in the hearing record. He did so again when the materials were delivered to him two weeks ago.

Dr. Stephens withdrew his call.

Dr. Garg stated that he made the motion to remand so that he could hear the circumstances of this case. One of the things he is hearing is that Dr. Vaughn would like to emphasize that she wasn't represented by counsel. Dr. Garg stated that the record indicates that this was questioned very clearly by the Hearing Examiner. The courts also noted that her lack of counsel was her own choice. Dr. Garg continued that, concerning any mitigating testimony, what happened after 1986 is not the basis for the Board's decision. The decision is based on what went on in 1986.

Dr. Heidt stated that in the last two weeks the Board has read hundreds of pages and has re-evaluated the entire case. Dr. Vaughn was prescribing "tons of Obetrol", and was allowing her office personnel to hand out prescriptions on presigned forms and to practice medicine without a license. Dr. Heidt stated that he sees no reason to remand this matter.

EXCERPT FROM THE MINUTES OF AUGUST 11, 1993
IN THE MATTER OF MATTIE L. VAUGHN, M.D.

A roll call vote was taken on Dr. Garg's motion to remand:

Roll Call:	Mr. Albert	-nay
	Dr. Stephens	-nay
	Dr. Gretchen	-nay
	Dr. Gretter	-nay
	Dr. Heidt	-nay
	Dr. Buchan	-nay
	Dr. Garg	-nay
	Ms. Noble	-nay
	Dr. Steinbergh	-nay
	Dr. Agresta	-nay

The motion failed.

MR. ALBERT MOVED TO APPROVE AND CONFIRM MS. SAGE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF MATTIE L. VAUGHN, M.D. DR.

GRETTER SECONDED THE MOTION.
Dr. Agresta asked whether there were any questions concerning the proposed findings of fact, conclusions, and order in the above matter.

DR. GRETTER MOVED THAT THE CONCLUSIONS IN THE MATTER OF MATTIE L. VAUGHN, M.D., BE AMENDED TO DELETE PARAGRAPH #4 IN ITS ENTIRETY. HE FURTHER MOVED THAT THE FOLLOWING ORDER BE ADOPTED IN THE MATTER OF MATTIE L. VAUGHN, M.D.:

> It is hereby ORDERED that the certificate of Mattie L. Vaughn, M.D., to practice medicine and surgery in the State of Ohio be and is hereby PERMANENTLY REVOKED.
>
> This Order shall become effective thirty (30) days from the date of mailing of notification of approval by the State Medical Board of Ohio, except that Dr. Vaughn shall immediately surrender her Drug Enforcement Administration certificate and shall not order, purchase, prescribe, dispense, administer, or possess any controlled substances, except for those prescribed for ehr personal use by another so authorized by law. In addition, Dr. Vaughn shall not in the interim undertake the care of any patient not already under her care.

Mr. Albert spoke in support of Dr. Gretter's motion, noting that there were many things involved in this case. He added that he didn't think that the "valupoints" played much part in his original decision in this matter.

Dr. Gretter stated that the specifics of this case have been reviewed. Dr. Vaughn failed to meet minimal standards of care, she left pre-signed prescriptions in her office, she allowed the unlicensed practice of medicine in her office.

Dr. Agresta stated that he doesn't believe there was any doubt in the Board members' minds at the time of the initial consideration that this

was a matter deserving permanent revocation.

Dr. Garg stated that he has nothing against the amendments except for the penalty of permanent revocation. Dr. Garg referred to the closing paragraph of Ms. Sage's Conclusions in her Report and Recommendation, which indicates that Dr. Vaughn's conduct did not arise from a lack of knowledge or training. It goes on to say that at the hearing Dr. Vaughn expressed valid concern about problems associated with obesity. Her faults seem to lie in establishing and following a protocol and no doubt that the tone of Dr. Vaughn's practice indicated very reckless prescribing at that time, even if it was not illegal to prescribe the suppressants. There was a legitimate question concerning her practice. Dr. Garg continued that he had been sitting on the Board at the time of initial consideration he would not have supported a permanent revocation of Dr. Vaughn's license.

Mr. Henderson stated that Dr. Vaughn would like to make a statement to the Board.

Dr. Agresta stated that that would be out of line.

A roll call vote was taken on Dr. Gretter's motion to amend:

Roll Call:
Mr. Albert -aye
Dr. Stephens -aye
Dr. Gretchen -aye
Dr. Gretter -aye
Dr. Heidt -aye
Dr. Buchan -aye
Dr. Garg -nay
Ms. Noble -nay
Dr. Steinbergh-abstain
Dr. Agresta -aye

The motion carried.

DR. GRETTER MOVED TO APPROVE AND CONFIRM MS. SAGE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS,

AND ORDER, AS AMENDED, IN THE MATTER OF MATTIE L. VAUGHN, M.D. DR. HEIDT SECONDED THE MOTION.

Ms. Noble stated that she believes revocation is a bit harsh for what has been done in this case. Based on the cases she has reviewed during her time on the Board, this case does not fall into the category, in her mind, of permanent revocation.

Ms. Noble stated that she agrees something needs to be done, but she does not agree with permanent revocation.

Dr. Garg agreed with Ms. Noble. He stated that he has no disagreement that Dr. Vaughn's practice was totally unacceptable, no matter how long ago it was. Dr. Vaughn showed a total disregard for the laws of the state in practicing medicine as she did. Dr. Garg stated that he would favor a lesser penalty, such as an indefinite suspension or a lengthy suspension with requirements for reinstatement. A mini-residency might be appropriate. Dr. Garg stated that Dr. Vaughn is a knowledgeable and intelligent person who could be of use to the community in providing services to its citizens.

Dr. Gretter stated that according to the Board's disciplinary guidelines, each individual violation by Dr. Vaughn carries a maximum penalty of permanent revocation. He added that this is true of both the previous guidelines adopted by the Board and the more current guidelines. He believes revocation is appropriate in this case.

Ms. Noble stated that the Board has seen other cases where revocation is in the guidelines but the Board didn't permanently revoke the license. Those physicians are presently practicing medicine with the Board's sanction. She stated that the Board really needs to look at the manner in which it issues permanent revocations and the types of cases in which the Board does not issue a permanent revocation.

Dr. Garg stated the during the hearing there was a point made by the Assistant Attorney General that the harm in this case was not to the patients but to the community. Dr. Garg stated that he is unsure what harm was done to the community. Basically, this is a controversial

issue. Dr. Garg stated that he is not trying to justify Dr. Vaughn's practice. He stated that, in his judgment, she deserves a chance.

Dr. Heidt stated that the Board is seeing in this case a failure of minimum standards. Dr. Vaughn "used" medications poorly and there was insufficient record keeping. Not only that, but the established practice was for office staff to indiscriminately give out prescriptions. Dr. Heidt stated that the Board licenses over 100 individuals per month to practice medicine, who do so in the right way. It cannot tolerate those who can't maintain minimal standards of care.

Ms. Noble agreed that it should not be tolerated, but suggested a degree of training is necessary. She noted that no patient suffered harm.

Dr. Heidt stated that no patient suffered harm of which the Board is aware.

Ms. Noble stated that that is correct. She stated that the Board has seen cases where drugs were given to individuals who were known addicts, yet those doctors' licenses weren't permanently revoked. She stated that it is much worse to give drugs to someone addicted that to allow a licensed practical nurse to give out these types of prescriptions. Ms. Noble added that the Board has also seen physicians with psychological problems who have caused detrimental, irrevocable problems for patients and the Board has not revoked their licenses. The Board needs to weigh cases such as the one under consideration to see if the physician is retrainable. She does not see how the Board can say that Dr. Vaughn's license needs to be permanently revoked when it has not revoked in other cases involving much worse behavior. She stated that something needs to be done in this case, but not revocation.

Dr. Stephens stated that he disagrees completely with Ms. Noble. He stated that, to him, the most glaring problem in this case was not the fact that Dr. Vaughn wrote prescriptions, but that she allowed someone else to illegally practice medicine. The Board cannot tolerate a physician doing that.

Dr. Garg stated that he can't disagree with Dr. Stephens' statement. he

does disagree with Dr. Heidt only in the sense that the board doesn't know that the over 100 physicians it licenses every month practice correctly. He added that the question of patient harm was also addressed. 25 % of 4,000 patient records were reviewed by the Board's expert witness and no patient harm was found. Dr. Garg stated that that is beside the point and doesn't lessen what Dr. Vaughn did wrong. All he is saying is that he does not favor permanent revocation in this case.

Dr. Agresta stated that this case was appealed, and the court upheld everything but one factor, and that related to the acceptance of "valupoints."

Dr. Garg stated that the appellate court does not base its decision on right and wrong. The Appellate Court only looks at whether the trial court did its job properly. It did reverse a couple of points that were reversed by the trial court.

Mr. Henderson stated that the two court decisions must be read in conjunction with each other. He stated that this is imperative.

Dr. Gary stated that the Appellate Court cannot retry the case, they only looked at what the lower court did. The Appellate Court disagreed with the lower court's conclusions.

Ms. Berry stated that the Court of Appeals decision is the final decision. The Court of Appeals upheld the Board's Order with the exception of the Board's findings as to the Section 4731.22(B)(4), Ohio Revised Code, violation.

Mr. Henderson stated that he takes strong exception to Ms. Berry's statement. The Court of Appeals was reviewing the trial court's decision.

Mr. Albert asked whether the Board is retrying the case.

Dr. Agresta stated that it is not.

A roll call vote was taken on Dr. Gretter's motion to approve and confirm as amended:

Roll Call:	Mr. Albert	-aye
	Dr. Stephens	-aye
	Dr. Gretter	-aye
	Dr. Heidt	-aye
	Dr. Buchan	-aye
	Dr. Garg	-nay
	Ms. Noble	-nay
	Dr. Steinbergh	-aye

The motion carried.

APPENDIX Y

STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor
Columbus, Ohio 43266-0315

EXHIBIT
E

STATE MEDICAL BOARD
OF OHIO
93 AUG 10 AM 11:22

IN THE MATTER OF:

MATTIE LOU VAUGHN, M.D.

MOTION FOR REMAND

Now comes Mattie Lou Vaughn, M.D., by and through counsel to hereby request that this matter be remanded to a hearing officer for the purpose of presenting new and mitigating evidence. Grounds for this Motion are contained in the accompanying Memorandum In Support.

/s/ Thomas L. Henderson
THOMAS L. HENDERSON
Ohio Supreme Court No. 0039789
MATAN & SMITH
261 South Front Street
Columbus, Ohio 43215
(614) 228-2678
Attorney for Mattie L.Vaughn,M.D.

MEMORANDUM IN SUPPORT

By letter dated August 2, 1993, and received August 5, 1993, the matter of Mattie Lou Vaughn, M.D., is scheduled for consideration

at the August 11, 1993, meeting of the State Medical Board. An administrative hearing was held on April 13, 1989, through April 19, 1989, before this Board regarding the movant herein. This matter has further been considered on appeal to the Court of Common Pleas in Franklin County and the Court of Appeals, Tenth District. This matter ultimately was appealed to the Ohio Supreme Court, which denied jurisdiction. Without delving into a long citation of the facts and circumstances, the movant would like to bring to the attention of this Board that the Court of Common Pleas Order, in compliance with the Decision and Order of the Tenth District Court of Appeals, remanded this matter to the Board for a disciplinary hearing (see "Exhibit A" attached hereto). Pursuant to this Judgment Entry, the Board issued a notice on August 5, 1993, of a meeting of the State Medical Board on August 11, 1993. Dr. Vaughn, therefore, has had less than one week to request this motion and prepare for the meeting.

Dr. Vaughn respectfully requests that this Board, pursuant to the Court of Common Pleas' Judgment Entry, permit Dr. Vaughn an opportunity to present new and mitigating evidence which the movant believes is relevant and necessary for the Board to make an informed and fair decision. Dr. Vaughn would like to emphasize to this Board that she was not represented by legal counsel at the original hearing. This Board, therefore, should permit Dr. Vaughn an opportunity to present new and mitigating evidence by and through the undersigned counsel in order to ensure a fair and equitable hearing in accordance with the Judgment Entry of the Court of Common Pleas and the Decision and Order of the Tenth District Court of Appeals.

Respectfully submitted,

/s/ Thomas L. Henderson
Thomas L. Henderson
Ohio Supreme Court No. 0039789
Attorney for Mattie Lou Vaughn, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Motion For Remand** was served upon LAREN LUBOW, Case Control Officer, State Medical Board of Ohio, 77 South High Street, 17th Floor, Columbus, Ohio 43266-0315; and upon ANNE C. BERRY, Assistant Attorney General, at 30 East Broad Street, 15th Floor, Columbus, Ohio 43215-0410, on this 10th day of August, 1993, by hand delivery.

/s/ Thomas L. Henderson
THOMAS L. HENDERSON

Supreme Court, U.S.
FILED
OCT 24 1996
CLERK

(2)

No. 96-340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MATTIE L. VAUGHN, M.D.,

Petitioner,

v.

THE STATE MEDICAL BOARD OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

DAVID K. FRANK
(Counsel of Record)

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Counsel for Petitioner

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STATEMENT OF THE CASE

The characterization of Dr. Vaughn's medical practice as "little more than a diet pill mill" by The State Medical Board of Ohio (the "Board") is not a fair characterization of her practice, even before the disciplinary proceeding of 1986 was initiated. It does not accurately describe her practice after changes were made and the practice reformed following the initiation of the disciplinary charges in question.

The Board's reference to "non-physician office staff" also fails to note the involvement of a trained nursing staff in Dr. Vaughn's practice.

REASONS FOR GRANTING THE PETITION

In response to the Petitioner's petition, the Board argued that this Court should reject the petition because, according to the Board:

1. This "case is only about Dr. Vaughn individually, and whether the State of Ohio has properly decided that she should no longer be afforded the privilege of practicing medicine." (Board brief, p. 4.)

2. "[T]he revocation of a medical license is not 'punishment' for the purposes of the cruel and unusual punishment clause of the Eighth Amendment." (Board brief, p. 6.)

3. "[E]ven if the cruel and unusual punishment clause were to apply, Dr. Vaughn's violations were so egregious as to justify revocation of her license." (Board brief, p. 7.)

4. "[T]he right of allocation does not apply to state licensure disciplinary proceedings." (*Id.*)

5. No "valid constitutional issue is presented." (Board brief, p. 9.)

The Board's contentions, however, are simply wrong!

I.

This Case, Which Squarely Presents The Issue Of Whether The Protection Of The Eighth Amendment Applies To State Disciplinary Proceedings, Is Not Just "About Dr. Vaughn Individually."

The Board suggested that "there is simply no reason for this Court to hear this case," because, according to the Board, "this case is **only** about Dr. Vaughn **individually**" (Board brief, p. 4) (emphasis added). It failed to recognize that what is at stake is not only the protection of Dr. Vaughn's constitutional rights, but also the Eighth Amendment right of **all Americans**, including thousands of licensed professionals in future state disciplinary proceedings, to be free from the unfettered abuse of a state's "power to punish." The Constitution of the United States "covers with the shield of its protection all classes of men [and women], at all times, and under all circumstances." *Ex Parte Milligan*, 71 U.S. (4 Wall) 2, 120-21 (1866).

As Mr. Justice Harlan noted in *Chessman v. Teets*, 354 U.S. 156, 165 (1957):

> . . . the overriding responsibility of this Court is to the Constitution of the United States . . . **The proponent before the Court is not the petitioner but the Constitution of the United States.**
>
> [Emphasis Added]

Accordingly, there is a compelling reason for this Court to hear this case and resolve the issues of first impression for this Court which are squarely presented.

II.

The Board's Contention That The Revocation Of A Medical License Is Not "Punishment" For The Purposes Of The Cruel And Unusual Clause Of The Eighth Amendment Is Erroneous.

The Board, at pages 5 through 6 of its brief, argued that the state's revocation of a medical license is not "punishment," but merely remedial action to "protect its citizens from unqualified or incompetent practitioners." Significantly, however, it did not (and could not ethically or fairly) argue that the sanction imposed was **"solely"** to serve a remedial purpose. This is fatal to the Board's argument, since this court recognized in *United States v. Harper*, 490 U.S. 435 (1989) that:

> a civil sanction that cannot fairly be said **solely** to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is **punishment**, as we have come to understand the term. *Id.* at 448.
>
> [Emphasis Added]

As noted at page 24 of Dr. Vaughn's Petition:

> From the State Medical Board's perspective, permanent revocation of Dr. Vaughn's medical license serves **both a retributive and deterrent purpose**. The State Medical Board is punishing Dr. Vaughn for her past behavior. By publishing records of its proceedings, in two official publications, *YOUR REPORT FROM THE STATE MEDICAL BOARD OF OHIO* and *FORMAL ACTION MAILING LIST*, the Board also

> apparently hopes to deter other doctors from engaging in prohibited conduct.
>
> [Emphasis Added]

The Board's flawed argument that the sanction imposed upon Dr. Vaughn was merely remedial is very similar to the government's argument in *Austin v. United States*, 509 U.S. 602, 113 S.Ct 2801 (1993), which this Court specifically rejected. *Id.*, at 2801-2811.

In Ohio, disciplinary proceedings and sanctions against licensed professionals historically have been understood to serve not simply a remedial purpose, but also that of **punishment**. See, e.g., *Toledo Bar Association v. DeMars*, 56 Ohio St. 3d 90 (1990) (a disciplinary case in which the Supreme Court of Ohio noted that "alcoholism is a mitigating factor in determining an errant attorney's **punishment**"); *Hale v. Ohio State Veterinary Board*, 47 Ohio App. 3d 167, 548 N.E. 2d 247 (1988) (a disciplinary case involving a veterinarian where the Court noted that the respondent, Dr. Hale, had challenged "the severity of the **punishment** of a six-month license suspension"); *Amon v. State of Ohio, State Medical Board*, 67 Ohio App. 3d 287, 292, 586 N.E.2d 1165 (1990) (a disciplinary case against an Ohio physician convicted of a felony involving conspiracy to distribute cocaine in which the Court remanded the case for a mitigation hearing "which would affect only the **'punishment'** or sanctions to be imposed by the State Medical Board"); *In the Matter of: David R. Williams, M.D. v. State Medical Board of Ohio*, 1990 Ohio App. LEXIS 2088, aff'd 60 Ohio St. 3d 85 (1991) (a disciplinary case involving a physician where the Board suspended a medical license for a three-year probationary period, and the Court concluded that while "deprivation of the right to prescribe all controlled substances . . . may be an appropriate **'punishment'** in certain instances, the facts of this case do not support such a severe sanction . . . ") [Emphasis Added].

Moreover, to use the language of the Seventh Circuit in *Vann v. Scott*, 467 F. 2d 1235, 1240 (7th Cir. 1972), even a "remedial" rehabilitative approach (less drastic than the permanent revocation of a license to practice a profession) can constitute cruel and unusual punishment:

> . . . [N]either the label which a State places on its own conduct, nor even the legitimacy of its motivation, can avoid the applicability of the Federal Constitution. **We have no doubt that well intentioned attempts to rehabilitate . . . could,** in extreme circumstances, **constitute cruel and unusual punishment proscribed by the Eighth Amendment.** [Emphasis Added]

III.

Contrary To The Medical Board's Allegations, The Punishment Imposed Upon Dr. Vaughn Was Inappropriate and Disproportionate To Her Conduct, Particularly In View Of The Disparate Punishment She Received From The Board As Compared.

At page 7 of its brief, the Board argued that "even if the cruel and unusual punishment clause were to apply, Dr. Vaughn's violations were so egregious as to justify revocation of her license." This argument is also without merit. While Dr. Vaughn's conduct was improper and justified an "appropriate and reasonable penalty," the punishment of permanent revocation was, under all circumstances of the case, improper and unconstitutional.

Any disciplinary sanction imposed must be "**an appropriate and reasonable penalty under the circumstances**" of the case. *Ohio State Bar Ass'n v. Loha*, 4 Ohio St. 3d 190 (1953) (emphasis added). A penalty is "inappropriate" if it is "**unduly harsh or unreasonable**." See *Columbus Bar Ass'n v. Wolfe*, 70 Ohio St. 2d 55 (1982); *Toledo Bar Ass'n v. Lichota*, 15 Ohio St.

2d 217 (1968). The Supreme Court of Ohio has also recognized that disciplinary sanctions imposed upon an Ohio doctor must always be "**proportionate**" to the doctor's misconduct. As noted in *Brost v. Ohio State Medical Board*, 62 Ohio St. 3d 218, 221 (1991):

> R.C. 4731.22(B) provides that the board, "pursuant to an adjudicatory hearing under Chapter 119 of the Revised Code and by a vote of not less than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate . . . or reprimand or place on probation the holder of the certificate . . . .
>
> As noted, the General Assembly has granted the board a broad spectrum of sanctions from which to choose. **Naturally, the General Assembly intended that the sanction selected by the board be proportionate to the prohibited act or acts committed by the doctor**. . . . [Emphasis Added]

A disciplinary sanction which is so disproportionate to the conduct of the doctor as to "shock the sense of justice of the community" is unconstitutional. *See, e.g., Solem v. Helm*, 463 U.S. 277, 303 (1983); and *Robinson v. California*, 370 U.S. 660, 667 (1962) (noting that even a "single day in prison may be unconstitutional in some circumstances"). In the case of Dr. Vaughn, the penalty of permanent revocation is clearly **"unduly harsh" and disproportionate to her conduct**:

- A review of the records of 1,000 of Dr. Vaughn's patients by the Board's expert witness found that **Dr. Vaughn did not cause any patient harm**. (R. 89, Board Minutes at 8).

- One of the Board members explicitly recognized **even without mitigating evidence that "revocation is a bit harsh for what has been done in this case."** (R. 89, Board Minutes at 8).

- Another Board member [Dr. Garg] recognized that "**Dr. Vaughn is a knowledgeable and intelligent person who could be of use to the community in providing [medical] services to its citizens.**" (R. 89, Board Minutes at 7).

- Dr. Vaughn has never had a medical malpractice suit filed against her since she graduated from medical school in 1973.

- According to Dr. Master, a physician who is familiar with Dr. Vaughn's medical work during the pendency of her battle with the Board, **Dr. Vaughn "has well-served her patients and the community."**

Dr. Vaughn was punished much more severely for engaging in less egregious behavior than many other doctors brought before the State Medical Board. **She even received a greater punishment than doctors who were convicted of felonies**. See Appendix A.

IV.

The Right Of Allocution, Guaranteed By The Due Process Clause Of The Fourteenth Amendment, Is Applicable To State Licensing Disciplinary Proceedings.

The Board, at page 7 of its brief, argued that the right of allocution "does not apply to state licensure disciplinary proceedings," and that:

> She [Dr. Vaughn] fails to tell the Court . . . why allocution should be recognized as a **procedural due process right** in addition to the established due process standard of "notice and opportunity to be heard."

Again, the Board is incorrect. As noted at page 21 of Dr. Vaughn's petition:

> The petitioner contends that the right of allocution is applicable to state disciplinary proceedings since all such proceedings should reflect "the notion, deeply rooted in the common law, that justice must satisfy the appearance of justice." *In re Grand Jury Proceedings Involving Eve Rosahn*, 671 F.2d 690, 696 (2d Cir. 1982) quoting *Levine v. United States*, 362 U.S. 610, 616 (1960).

The right of allocution serves the purpose of tempering punishment with mercy and ensuring that sentencing reflects individual circumstances. It is just as important in **quasi-criminal** disciplinary proceedings where the livelihood and professional status of a doctor is at issue as in a criminal proceeding where the punishment may be merely a monetary fine.

Allocution, as an aid to a state board or agency in the "sentencing phase," serves a somewhat different, but equally important purpose than the "notice and opportunity to be heard" due process standard:

a. The "notice" standard helps ensure that the respondent in a disciplinary proceeding has an opportunity to respond to the charges and present evidence in the **"guilt"** determination phase of the proceeding.

b. The right of allocution, however, concerns the **"sentencing"** phase of the proceeding and is important to ensure: (1) that justice satisfies the "appearance of justice," *Levine v. United States*, 362 U.S. 610, 616 (1960); (2) that the disciplinary sanction imposed "reflects individualized circumstances," *United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991), and; (3) that the disciplinary sanction is "an appropriate and reasonable penalty under the circumstances" of the case. *Ohio State Bar Association v. Loha, supra.*

The opportunity to exercise the right of allocution is particularly critical in a case such as Dr. Vaughn's, where there has been: (1) a long **seven-year** period between the time of the misconduct in question and the institution of disciplinary proceedings (1986) and the final determination of punishment (August 1993) and (2) a significant change of circumstances during that time period which was relevant to the determination by the Board of a just and reasonable punishment. [During this seven-year period, while practicing medicine pursuant to Court-ordered stay, Dr. Vaughn reformed her practice and "provided excellent medical care to her patients and the community."] *See* paragraphs 12 and 15 of **Appendix A** (Affidavit of Bernard F. Master, D.O., which was submitted herein in support of Petitioner's September 19, 1996 application to this Court [4-208] for a stay order pending certiorari).

The Board argued that the right of allocution does not apply to an administrative disciplinary proceeding because, in its opinion, "the criminal defendant's **liberty interests** prior to sentencing were **much more compelling** than the administrative respondent's **property interests** in his license to practice his profession." [Emphasis Added].

This is not always the case, particularly when the revocation of a professional license can cause loss of social and professional status, financial ruin, and the imposition of an economic "fine" which can be many times greater than fines imposed for violation of criminal laws (i.e., the lifetime loss of earnings which would otherwise accrue from the respondent's medical practice). Moreover, the revocation of a medical license embodies not only a property interest, but a liberty interest as well.

The Board failed to recognize that state disciplinary proceedings involving professionals are **quasi-criminal** proceedings. *In re Ruffalo*, 390 U.S. 544, 551 (1968). Accordingly, the safeguard against inappropriate sentencing afforded by the right of allocution in criminal proceedings is equally applicable to disciplinary proceedings.

Dr. Vaughn is not seeking "**additional** due process" as the Board contends. She is, however, seeking that to which she is **entitled**: a proper sentencing determination **after** the exercise of her constitutional right of allocution.

V.

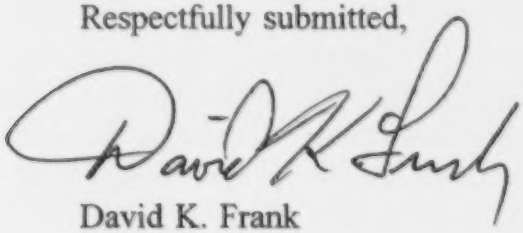
Valid Constitutional Issues Are Presented Under The Facts Of This Case.

The Board's contention that no "valid constitutional issue is presented" in this case is without merit. On the contrary, **two** important constitutional issues involving the Eighth and Fourteenth Amendments are presented which merit review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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October 22, 1996

APPENDIX A

SUMMARY OF LESS SEVERE PUNISHMENTS IMPOSED BY THE STATE MEDICAL BOARD OF OHIO ON OTHER PHYSICIANS WHO ENGAGED IN MORE EGREGIOUS MISCONDUCT THAN PETITIONER MATTIE L. VAUGHN, M.D.

According to a periodic publication entitled State Medical Board of Ohio Formal Action Mailing List, provided and distributed by the Board, the Board ordered the following punishments in the various medical disciplinary cases noted below:

Physicians Convicted of A Felony

* "**BROWN, CLYDE D.**
(MD #43905) - Cincinnati
Revocation, stayed; indefinite suspension, minimum six months; conditions for reinstatement; probationary terms, conditions and limitations for a period of at least five years. Based on doctor having pleaded guilty in U.S. District Court to four felony counts of Mail Fraud and one felony count of Money Laundering. Order mailed 5/12/95; Order effective 5/12/95." State Medical Board of Ohio Formal Action Mailing List, May, 1995, p. 2

* "**ELLIS, JOHN P.**
(DPM #2463) - Westlake
Revocation, stayed; certificate subject to probationary terms, conditions and limitations for minimum of five years. Based on doctor's convictions in 1989 and 1991 of robbery, and doctor's misrepresentation and publication of a misleading statement by submitting erroneous information on his 9/30/90 renewal application. Order mailed 11/27/92; Order effective 11/27/92." State Medical Board of Ohio Formal Mailing List, Jan./Feb., 1993, p. 3

* **"GRIFFIN, WILLIAM R., JR.**
(MD #25053) - Pickerington
Permanent revocation, stayed; probationary terms, conditions and limitations for a period of four years. Based on doctor having been found guilty of five felony counts of Forgery due to his having written prescriptions on five occasions for Percocet in the name of another individual, when the intended and actual recipient was the doctor's spouse." Order mailed 7/27/95; Order effective 7/27/95." State Medical Board of Ohio Formal Action Mailing List, July, 1995, p. 2

* **"KUNKEL, ALLAN B.**
(MD #35214) - Cleveland
Revocation, stayed; indefinite suspension, minimum one year, such time to be calculated from 7/8/92, when immediate suspension of doctor's license was imposed; conditions for reinstatement; subsequent for minimum of five years. Based of doctor's pleas of guilty to one felony count of drug trafficking and four felony counts of illegal processing of drug documents, stemming from doctor's excessive prescribing of narcotics to his wife, who subsequently underwent treatment for opiate addiction. Order mailed 12/22/92; Order effective 1/22/93, except that suspension is to be calculated from 7/8/92 as specified above." State Medical Board of Ohio Formal Mailing List, November/December, 1992, p. 2

* **"POGORELEC, EMIL E.**
(DO #2101)- Richmond Heights
Suspension for a period of 120 days to be calculated beginning March 8, 1995. Based on his plea of guilty of one felony count of illegal processing of drug documents. Order mailed 7/10/95; Order effective 7/10/95. Suspension effective 3/8/95-7/5/95." State Medical Board of Ohio Formal Action Mailing List, June, 1995, p. 3

* "**SCHUR, EZRIEL Z.C.**
(DPM #2038) - University Heights
Suspension, stayed; probationary terms, conditions and limitations for a period of one year. Based on doctor's pleas of guilty in U.S. District Court to one felony count of Mail Fraud. Order mailed 7/27/95; Order effective 7/27/95." State Medical Board of Ohio Formal Action Mailing List, July, 1995, p. 3

* "**VENIZELOS, PAUL C.** (M.D.) Westlake Revocation, stayed; 60 day suspension; subsequent 5 year probation, conditions to include evaluation for possible impairment and any recommended follow-up treatment. Based on felony conviction (Aggravated Vehicular Homicide)." State Medical Board of Ohio Formal Action Mailing List, June, 1989, p. 3

Physicians Who Engaged In Other Misconduct

* "**SHUMRICK, DONALD ALBERT**
(MD #29011) - Cincinnati
Doctor reprimanded based on his having been found guilty of prescription and dispensing by practitioner, a third degree misdemeanor, due to his having issued a prescription for a Schedule II controlled substance in the name of an individual for whom it was not intended; issuance of controlled substance prescriptions in the name of an individual for whom they were not intended, when the doctor had never met nor examined the individual for whom they were intended. Order mailed 1/18/95; Order effective 1/18/95". State Medical Board of Ohio Formal Action Mailing List, January, 1995, p. 3

* "**LANGLEY, MICHAEL GENE**
(MD #45219) - Walnut Ridge, AR.
Indefinite suspension; conditions for reinstatement;

subsequent probation for a minimum of five (5) years; doctor ineligible to hold D.E.A. registration without prior Board approval. Based on prior action by Arkansas State Medical Board, which was itself based upon a finding that doctor had committed "grossly negligent or ignorant malpractice" by prescribing excessive amounts of controlled substances to various patients and by writing an excessive number of prescriptions for addictive or potentially harmful drugs to those patients. (Journal Entry - no hearing requested) Order mailed 7/16/93; Order effective 7/16/93". State Medical Board of Ohio Formal - Action Mailing List, June, 1993, p. 3

* "**MASSER, ROGER J.**
(DPM #1864) - Columbus
Permanent revocation, stayed; license indefinitely suspended for a minimum of one year, such time to be calculated from 11/11/92, when the immediate suspension of doctor's certificate was imposed; conditions for reinstatement; subsequent probation for minimum of five years; doctor ineligible to hold DEA without prior Board approval. Based on doctor's pleas of guilty to felony drug abuse offenses (Illegal Processing of Drug Documents and Abuse), for which he was found eligible for treatment in lieu of conviction. Order mailed 4/16/93; Order effective 4/16/93." State Medical Board of Ohio Formal Action Mailing List, April/May, 1993, p. 2

* "**KRAUS, NELSON HARWARD**
(MD #36204) Worthington
Revocation, stayed; license indefinitely suspended for minimum of three years; conditions for reinstatement, including SPEX (clinical competency examination) and 300 hours of community service; subsequent probation for at least three years; doctor prohibited from requesting Board's approval to reapply for DEA certificate for at least two years following reinstatement. Based on improper prescribing of controlled substances to two

specified patients. Order mailed 3/16/93; Order effective 3/16/93." State Medical Board of Ohio Formal Action Mailing List, March, 1993, p. 2

* **"MCERLANE, ALBERT DAVID**
(MD #19653) - Cincinnati
Revocation, stayed; license indefinitely suspended; conditions for reinstatement established; subsequent for at least five years. Based on impairment of ability to practice according to acceptable and prevailing standards of care due to habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice. (Journal Entry - no hearing requested) Order mailed 3/12/93; Order effective 3/12/93." State Medical Board of Ohio Formal Action Mailing List, March, 1993, p. 2

* **"GEHRING, RICHARD F.**
(MD #21186) - Sylvania
Indefinite suspension, minimum sixty (60) days. Probation for five years with terms including educational requirements; permanent limitations prohibiting the prescribing of controlled substances appetite suppressants or treating patients for weight control. Based on violation of Board Rules governing controlled substances and state and federal laws governing method of issuing prescriptions. Order mailed 12/17/91; effective 12/17/91." State Medical Board of Ohio Formal Action Mailing List, December 13, 1991, p. 1

* **"SEIPLE, ROBERT STANLEY**
(DO #516) - Columbus
Indefinite suspension, minimum 90 days; conditions for reinstatement; subsequent five year probation; doctor permanently prohibited from treating patients for weight control problems and from prescribing any controlled appetite suppressants. Based on improper prescribing of controlled stimulants and other dangerous drugs to specified patients. Order mailed 5/16/91; suspension

effective 6/16/91." State Medical Board of Ohio Formal Action Mailing List, May 30, 1991, p. 3

* "**MATTONI, JOHN ARTHUR**
(MD #23584) - Toledo
Revocation, stayed, indefinite suspension, minimum one year; conditions for reinstatement; subsequent probation for at least three years. Based on doctor's having engaged in sexual relations with patient without appropriately terminating physician/patient relationship and when doctor knew or should have known that patient suffered from emotional problems; violation of Code of professional Ethics. Order mailed 3/15/91; suspension effective 4/15/91." State Medical Board of Ohio Formal Action Mailing List, March 18, 1991, p. 3

* "**ROY, SUKUMAR**
(MD #31344) - Solon
Three year probation imposed based on doctor's having performed a hysterectomy on a pregnant patient without performing prior diagnostic tests or other appropriate workup. Order mailed 7/13/90; Probation effective 7/13/90." State Medical Board of Ohio Formal Action Mailing List, July 19, 1990, p. 2

* "**MICHAELIS, THOMAS WILLIAM**
(MD #32590) - Cincinnati
Permanent revocation; stayed; indefinite suspension, min. 1 year, such time to be calculated from 7/1/91; conditions for reinstatement; subsequent probation, min. 5 years. Based on convictions for misdemeanors involving moral turpitude (Attempted Gross Sexual Imposition, Voyeurism and Public Indecency)." State Medical Board of Ohio Formal Action Mailing List, April/May, 1992, p. 2

* "**JOHNSON, DON R.**
(MD #18889) - Nelsonville
Revocation, stayed; indefinite suspension minimum three months; reinstatement requirements; subsequent probation for two years with additional limitations. Based on doctor's improper utilization of controlled substances for weight reduction and failure to comply with Medical Board rules concerning utilization of controlled substances for weight reduction. Order mailed 5/5/95; Order effective 6/5/95." State Medical Board of Ohio Formal Action Mailing List, April, 1995, p. 3

* "**JAIN, SHANTI**
(MD #47513) - Garden City, NY
Permanent revocation, stayed;' indefinite suspension, minimum one year; conditions for reinstatement; subsequent probation for at least two years upon commencement of practice in Ohio. Based on doctor's suspension and subsequent exclusion from New York State's Medicaid program; conviction of two counts of Offering a False Instrument for Filing, a second degree misdemeanor, based on the doctor's knowing submission of false invoices to the New York Medicaid program; exclusion from the Medicare program by the U.S. Department of Health and Human Services; prior action by New York Board of Professional Medical Conduct based on doctor's admission of guilt to the charge of professional misconduct; failure to advise Ohio Medical Board on application for license renewal of misdemeanor conviction. Order to be mailed; Order to become effective immediately upon date of mailing." State Medical Board of Ohio Formal Action Mailing List, January, 1995, p. 3.

APPENDIX B

No. 96-340

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MATTIE L. VAUGHN, M.D.,

Petitioner,

v.

THE STATE MEDICAL BOARD OF OHIO,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Ohio

AFFIDAVIT OF BERNARD F. MASTER, D.O.

STATE OF OHIO
COUNTY OF FRANKLIN, SS:

The affiant, Bernard F. Master, D.O., being first duly cautioned and sworn according to law, does hereby state and depose as follows:

1. I, BERNARD F. MASTER, D.O., am over 18 years of age, am competent to testify to the matters stated herein, and make this affidavit based upon my personal knowledge.

2. I am a physician licensed to practice medicine in Ohio, and have more than 20 years of experience in the practice of medicine.

3. I own and operate a medical clinic, called the Master Medical Center, located at 777 North High Street, Columbus, Ohio, which provides medical services to the Central Ohio area community.

4. Many of the patients of the Center are members of the African American population of Columbus, Ohio's inner-city area, who rely heavily on the Center and its doctors for their medical care.

5. Dr. Mattie L. Vaughn, who is an African American female, who is a highly trained and caring physician who has dedicated her professional life to serving the medical needs of the poor, and particularly those of poor members of the African American Community.

6. She has even served, periodically, as a medical missionary to the poor in the county of Haiti.

7. I have known Doctor Vaughn for more than five (5) years.

8. Between March 1991 and December 1995, Dr. Vaughn was employed at my clinic, the Master Medical Center, located at 777 North High Street, Columbus, Ohio.

9. In December of 1995, I asked her to work in my Cincinnati Medical Center known as Fairmount Family Practice located at 1515 Carll Street, Cincinnati, Ohio.

10. I am personally familiar with the work done by the Petitioner, Dr. Vaughn, and am also familiar with the disciplinary charges brought against her by the State Medical Board of Ohio which resulted in the legal battle between her and the State Medical Board of Ohio.

11. She continued to work for me and provide medical care to her patients during the time that the 1990 and 1993 orders of the State Medical Board of Ohio revoking her license to practice medicine were stayed or suspended by the Common Pleas Court of Franklin County, Ohio, and the Court of Appeals of Ohio.

12. She has not practiced medicine since on or about June 16, 1996 when the Supreme Court of Ohio in Case No. 96-117 denied her motion for a stay of execution and enforcement of that Court's final judgment of April 24, 1996 pending submission and disposition of a petition for certiorari to this Supreme Court of the United States.

13. During the years Dr. Vaughn practiced medicine under the stays issued by the Courts, during the pendency of her appellate battle with the State Medical Board of Ohio, she provided excellent medical care to her patients and the community and has not been the subject of any malpractice claim or suit, or patient complaint.

14. **In my professional opinion, action by this Court staying execution and enforcement of the Court's judgment and the State Medical Board's order to revoke her license will certainly <u>not</u> threaten the health, safety, and welfare of the public.**

15. On the contrary, denying her the right to continue to practice medicine would harm the public, by denying her patients the benefit of her skill and services.

16. She is a dedicated professional who has always been more concerned with helping people than making money --- which, unfortunately, is a rare quality in today's medical field.

17. Since the unfortunate circumstances which led to the commencement of the disciplinary proceedings against her in 1986 by the State Medical Board which are the subject of this case, she has reformed her practice and has well-served not only her patients, but the community and the medical profession.

/s/ Bernard F. Master, D.O.
BERNARD F. MASTER, D.O.

Sworn to and subscribed before me by the said Bernard F. Master, D.O. at Columbus, Ohio, on this 9th day of September, 1996.

/s/ Sandra Lloyd
NOTARY PUBLIC

Supreme Court, U.S.
FILED
OCT 4 1996
CLERK

No. 96 - 340

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MATTIE L. VAUGHN, M.D.,

Petitioner,

v.

THE STATE MEDICAL BOARD OF OHIO,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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CONSTITUTIONAL PROVISIONS AND STATUTES

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(The Medical Practices Act)

Ohio Rev. Code § 4731.22(B)(3) 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The version of Ohio Rev. Code § 4731.22 (the Ohio Medical Practices Act) that is set forth in Appendix W of the Petition reflects amendments to the statute as of June 1996, and so is not the version that was in effect on September 29, 1986, when the Respondent State Medical Board of Ohio initiated the disciplinary proceedings against Petitioner Dr. Vaughn that are the subject of this case. Therefore, reprinted in Appendix A hereto is Ohio Rev. Code § 4731.22 as in effect on September 29, 1986.

STATEMENT OF THE CASE

Petitioner, Mattie L. Vaughn, M.D. (Dr. Vaughn) asks this Court to review a state court of appeals decision which affirmed the revocation of Dr. Vaughn's medical license by the Respondent, the State Medical Board of Ohio (the Medical Board). Dr. Vaughn asserts that the revocation of her medical license was "cruel and unusual punishment" under the Eighth Amendment to the United States Constitution, even though this Court has traditionally refused to extend such protection beyond criminal proceedings, and even though the State courts found the sanctions imposed to be appropriate to Dr. Vaughn's violations of the Medical Practices Act, Ohio Rev. Code § 4731.22. Dr. Vaughn likewise asserts that she should have been accorded a "right of allocution" prior to the Medical Board's decision to revoke her license, even though that right again has been historically limited to criminal proceedings, and even though Dr. Vaughn had already been given ample opportunities to present her case and arguments.

For the most part, Dr. Vaughn's Statement of the Case is factually accurate. However, she has neglected to tell this Court what the charges brought by the Medical Board against her were really about.

Indeed, the facts established at the administrative hearing were clear and undisputed. Dr. Vaughn's medical practice was little more than a diet pill "mill." Dr Vaughn established protocols under which diet patients were given a cursory history and physical by her non-physician office staff. The staff would then issue prescriptions to the patients for a one-month supply of Obetrol, a Schedule II amphetamine, using prescription forms which Dr. Vaughn had pre-signed in blank. The Obetrol was subsequently alternated on a monthly basis with a Schedule III or Schedule IV anorectic medication. In this manner, some sixty to seventy patients were seen per day. Patients were seen in this manner whether or not Dr. Vaughn was in the office; testimony established that she was not in her office at least one to two days per week, and that even new patients would be accepted and treated in this manner by the office staff in Dr. Vaughn's absence.

The testimony also established that the patients would be issued these prescriptions prior to receipt of laboratory test results, and that known contraindications for the drugs (for example, hypertension and possible pregnancy) were ignored. Further, patients were continued on the amphetamine/anorectics for inappropriately long periods of time, often more than three months. Expert testimony established that Dr. Vaughn's care and treatment of the diet patients fell substantially below minimal standards of care and that she prescribed drugs for those patients without any legal and legitimate therapeutic purpose.

Dr. Vaughn mentions several times in her Petition that she was not represented by counsel at her administrative hearing. However, she was advised of her right to counsel several times prior to the commencement of the hearing, and she chose to go forward by representing herself. By the time that the Board itself initially considered her case, she had retained counsel, and has been represented continuously since, including on remand.

Dr. Vaughn appealed the Board's initial order revoking her license to practice medicine. As the result of that appeal, the Board's order that Dr. Vaughn violated the Medical Practices Act was affirmed in its entirety, except for one provision that had to do with whether she had improperly received something of value for referrals to a particular pharmacy. All of the most serious of the Board's findings, having to do with Dr. Vaughn's prescribing practices and departures from the minimum standards of care, were affirmed by the appellate court. (Petition Appendix M).[1] As a

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[1] In her Petition at 7, Dr. Vaughn notes that the court of appeals found that the lower court had "erred in failing to consider certain evidence." However, the evidence that the lower court failed to consider was evidence that Dr. Vaughn's prescribing of controlled substances had no *legitimate* therapeutic purpose. Based upon this evidence, the court of appeals sustained a cross-appeal filed by the Board and affirmed the Board's finding that Dr. Vaughn had violated Ohio Rev. Code § 4731.22(B)(3), by

result of its decision, the court remanded the case back to the Board for the entry of a new order.

The complaints presented by Dr. Vaughn in her Petition have to do with the Board's compliance with the court's remand order. In accordance with that order, the Board again considered the case against Dr. Vaughn at its meeting on August 11, 1993. Dr. Vaughn, through counsel, insisted that she had a right to present both "new" and "mitigating" evidence. The Board, however, refused to hear such additional evidence on the grounds that Dr. Vaughn had already had more than sufficient opportunity to be heard on the issues during the administrative hearing and subsequent appeals. The Board concluded that, even with the elimination of the referral issue, more than sufficient evidence had been presented that justified the revocation of Dr. Vaughn's medical license, and so entered a new revocation order. The Petition seeks to overturn the state courts' affirmance of that decision.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Introduction

Dr. Vaughn asks this Court to review the decision of the Ohio courts in this state medical licensure disciplinary proceeding on the grounds that it presents substantial questions arising under the United States Constitution. Dr. Vaughn does not assert that the case presents an important federal question decided by the Ohio courts in conflict with another state court of last resort, or in conflict with a United States court of appeals. Indeed, no other state or federal courts have agreed that the Eighth Amendment prohibition against cruel and unusual punishment is applicable to state licensure disciplinary proceedings. Likewise, no other state or federal courts have found that the right of allocution recognized

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prescribing drugs "for other than legal *and legitimate* therapeutic purposes."

in criminal cases is applicable under the due process clause of the Fourteenth Amendment to such disciplinary proceedings.

Further, Dr. Vaughn does not assert that the decision of the Ohio courts in this case conflicts with any relevant decisions of this Court. Rather, Dr. Vaughn claims that the decision of the Ohio courts on her purported constitutional claims is one of first impression for this Court. She forgets that, as will be explained below, the decisions of this Court lay no foundation whatsoever for her claims that concepts which historically have been applied only in the criminal context should apply to state licensure disciplinary proceedings.

When stripped of hyperbole and rhetoric, this case is only about Dr. Vaughn individually, and whether the state of Ohio has properly decided that she should no longer be afforded the privilege of practicing medicine. Such a decision is one properly made by the state in the exercise of its police power, in accordance with the responsibility of the state to protect the health and safety of its citizens by prohibiting the practice of medicine by unqualified or incompetent individuals. There is simply no reason for this Court to hear this case.

II. Certiorari Should Not Be Granted Because (1) The Cruel and Unusual Punishment Clause Does Not Apply to the Revocation of a Medical License, and (2) the Sanction Imposed Here Was Not Disproportionate to the Violations Found.

The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Dr. Vaughn argues vaguely in her Petition that the Ohio courts erred in holding that the revocation of her medical license was not subject to review under this amendment; however, she offers no basis upon which this Court should apply the protection of the cruel and unusual punishment clause to a state medical disciplinary proceeding. Nor

does she offer any explanation why, even if the clause were to be applied, her conduct was not proportionate to the revocation of her medical license.

Indeed, Dr. Vaughn ignores long-standing precedent of this Court refusing to apply the cruel and unusual punishment clause beyond the criminal context. This Court has traditionally found that the text of the clause suggests an intention to limit the power of the *criminal* courts. Hence, in *Ingraham v. Wright,* 430 U.S. 651 (1977), this Court declared that "[a]n examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." *Id.* at 662.[2] Likewise, in *Alexander v. United States*, 509 U.S. 544 (1993), the Court observed that the cruel and unusual punishment clause is "concerned with matters such as the duration or conditions of confinement", which are clearly matters unique to the criminal context and are irrelevant to medical licensure disciplinary proceedings.

Dr. Vaughn nevertheless asserts that the revocation of a medical license is a "punishment" by the state which should be subject to review under the Eighth Amendment, because the purpose of the revocation is retribution against the physician in question and deterrence of others. To the contrary, such a revocation is imposed to protect the public from a physician who has proven by her conduct that she should not be allowed to practice medicine. *See, e.g. Loui v. Board of Medical Examiners*, 78 Hawaii 21, 889 P.2d 705 (1995) (suspension of medical license serves the legitimate governmental objective of protecting the public from an unfit physician, and so does not violate the double

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[2] In the Petition at p. 18, Dr. Vaughn cites to the *Ingraham* case for the opposite proposition, that is, that the Eighth Amendment has been held applicable to civil proceedings. She fails to note, however, that the portion of the *Ingraham* opinion to which she cites is contained in the dissent, and that the cases cited in that dissent all related to criminal proceedings.

jeopardy clause); and *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 551 N.E.2d915 (1990), *cert. denied* 498 U.S.823 (1990) (revocation of medical license is considered to be remedial for purposes of the double jeopardy clause). Indeed, as this Court recognized in 1898:

> No precise limits have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies.

Hawker v. New York, 170 U.S. 189, at 193 (1898) (affirming the constitutionality of a New York statute which prohibited a convicted felon from practicing medicine). *See, also, Dent v. West Virginia*, 129 U.S. 114 (1888) (affirming the right of a state under its police power to require that physicians be licensed and meet specified requirements).

Therefore, the revocation of a medical license is not "punishment" for the purposes of the cruel and unusual punishment clause of the Eighth Amendment. Rather, a medical license is revoked by the state under its authority and responsibility to protect its citizens from unqualified or incompetent practitioners. This was precisely the purpose of the State Medical Board of Ohio in revoking Dr. Vaughn's license; her violations of the laws and rules governing the practice of medicine in the state of Ohio, and her violations of the minimum standards of care, imposed upon the Board an obligation to take action to protect the public.

Moreover, Dr. Vaughn's violations of those laws and standards of care are not before this Court; those were affirmed

during Dr. Vaughn's first round of appeals, and she did not seek review of that affirmance in this Court. The only issue before this Court is whether it should review the revocation imposed by the Board as possibly being "cruel and unusual punishment." As found by the state courts, even if the cruel and unusual punishment clause were to apply, Dr. Vaughn's violations were so egregious as to justify revocation of her license. As a result, this issue is not appropriate for certiorari review.

III. Certiorari Should Not Be Granted Because (1) The Right of Allocution Does Not Apply to State Licensure Disciplinary Proceedings and (2) Dr. Vaughn was Provided a Sufficient Opportunity to Present Evidence of Mitigation.

Dr. Vaughn also argues that she was denied her right to due process under the Fourteenth Amendment to the United States Constitution because she was denied a "right of allocution" before the Board voted (for the second time) to revoke her medical license. In making this argument, she again seeks extension of a concept traditionally limited to the criminal courts. She fails to tell the Court, however, why allocution should be recognized as a procedural due process right *in addition* to the established due process standard of "notice and an opportunity to be heard," which were fully complied with in this case. In addition, Dr. Vaughn has failed to tell the Court why she should have been given yet *another* opportunity to speak, when she had already had an opportunity to present mitigation at her original hearing and the remand was only to consider the impact that one of the original charges had been reversed.

The right of allocution is an ancient common law right, recognized since at least the 1600s. Like the cruel and unusual punishment clause, it has traditionally been applied only in the context of *criminal* proceedings. *Green v. United States*, 365 U.S. 301 (1961).

As admitted by Dr. Vaughn, a right of allocution has never been applied by this Court to administrative disciplinary proceedings concerning professional licenses. Indeed, as explained above, the Board's decision to revoke her medical license was not "sentencing" in the same manner as is the sentencing of a convicted criminal. The criminal defendant is sentenced as punishment for the crimes committed; the revocation of a medical license, on the other hand, is remedial in nature, and is done to protect the public.

Dr. Vaughn cites no cases whatsoever that apply a right of allocution to an administrative disciplinary proceeding, or to any other non-criminal proceeding. The reason there are no such cases is obvious: the criminal defendant's liberty interests prior to sentencing are much more compelling than the administrative respondent's property interests in his license to practice his profession.

Due process in the administrative arena means notice and an opportunity to be heard. The concept that procedural due process has been given if an *opportunity* to be heard has been provided is well-settled. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254 (1970). The requirement of the due process clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

As found by the court of appeals, Dr. Vaughn had already been afforded *more* than sufficient due process prior to the point where she now claims that she should have been afforded a "right of allocution." She had been given a full administrative hearing, at which she was permitted to appear, present evidence, and examine witnesses testifying for and against her. She had then availed herself of her right to appeal the Board's original order through three levels of Ohio courts. When the case was returned to the Board in 1993, those courts had affirmed that Dr. Vaughn had violated the minimal standards of care by her prescribing and patient care practices.

In reality, what Dr. Vaughn wanted to do by exercising a so-called "right of allocution" was to present new and additional evidence to the Board, when her violations had already been affirmed by the Ohio courts. Indeed, her request to the Board for a new mitigation hearing was for the purpose of presenting evidence of her conduct subsequent to the violations and the initial Board order. Thus, she wanted the chance to re-try her case. Such a right to *additional* due process would simply be excessive in the context of such an administrative proceeding. *See, e.g. Keney v. Derbyshire*, 718 F.2d 352 (10th Cir. 1983) (physician's claim that due process entitled him to a probable cause hearing before being formally charged with misconduct, in addition to an evidentiary hearing on the charges themselves, was excessive in a license revocation setting). The Ohio court of appeals correctly found that Dr. Vaughn had already *had* all of the process due to her, and that she had no further constitutional right "to be heard," simply because her case and her appeals had been pending for several years.

No valid constitutional issue is presented, but even if such an issue were presented generally, the issue is simply not presented under the facts of this case. As a result, certiorari review is again inappropriate.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

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APPENDIX A

Ohio Rev. Code § 4731.22,
as in effect from March 24, 1986 until March 17, 1987

4731.22 Grounds for refusal to grant and revocation of certificate; hearing and investigation; report.

(A) The state medical board, by a vote of not less than six of its members, may revoke or may refuse to grant a certificate to a person found by the board to have committed fraud in passing the examination or to have committed fraud, misrepresentation, or deception in applying for or securing any license or certificate issued by the board.

(B) The board, by a vote of not less than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(1) Permitting one's name or one's certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given;

(2) Failure to use reasonable care discrimination in the administration of drugs, or failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease;

(3) Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes or conviction of violation of any federal or state law regulating the possession, distribution, or use of any drug;

(4) Wilfully betraying a professional confidence or engaging in the division of fees for referral of patients, or the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business;

(5) Soliciting patients or publishing a false, fraudulent, deceptive, or misleading statement.

As used in this division, "false, fraudulent, deceptive, or misleading statement" means a statement that includes a

misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

(6) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established;

(7) Representing, with the purpose of obtaining compensation or other advantage for himself or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured;

(8) The obtaining of, or attempting to obtain, money or anything of value by fraudulent misrepresentations in the course of practice;

(9) Conviction of a felony whether or not committed in the course of his practice;

(10) Conviction of a misdemeanor committed in the course of his practice:

(11) Violation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued;

(12) Failure to pay license renewal fees specified in this chapter;

(13) Any division of fees or charges, or any agreement or arrangement to share fees or charges, made by any person licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery with any other person so licensed, or with any person;

(14) The violation of any provision of a code of ethics of a national professional organization as specified in this division. "National professional organization" means the American medical association, the American osteopathic association, the American podiatry association, and such other national professional organizations as are determined, by rule, by the state medical board. The state medical board shall obtain and keep on file

current copies of the codes of ethics of the various national professional organizations. The practitioner whose certificate is being suspended or revoked shall not be found to have violated any provision of a code of ethics of an organization not appropriate to his profession.

(15) Inability to practice according to acceptable and prevailing standards of care by reason of illness, excessive use of alcohol, excessive use of controlled substances, drugs, or chemicals, or as a result of a mental or physical condition. In enforcing this division, the board upon a showing of a possible violation, may compel any individual licensed or certified to practice by this chapter or who has applied for licensure or certification pursuant to this chapter to submit to a mental or physical examination, or both, as required by and at the expense of the board. Failure of any individual to submit to a mental or physical examination when directed constitutes an admission of the allegations against him unless the failure is due to circumstances beyond his control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board finds a physician unable to practice because of the reasons set forth in this division, the board shall require such physician to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for initial, continued; reinstated, or renewed licensure to practice. An individual licensed by this chapter affected under this section shall be afforded an opportunity to demonstrate to the board that he can resume his practice in compliance with acceptable and prevailing standards under the provisions of his certificate. For the purpose of this section, any individual licensed or certified to practice by this chapter accepts the privilege of practicing in this state, and by so doing or by the making and filing of a registration or application to practice in this state, shall be deemed to have given his consent to submit to a mental or physical examination when directed to do so in writing by the board, and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

(16) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring

to violate, any provisions of this chapter or any rule promulgated by the board;

(17) The violation of any abortion rule adopted by the public health council pursuant to section 3701.341 of the Revised Code;

(18) The revocation or suspension by another state of a license or certificate to practice issued by the proper licensing authority of that state for an action that would also have been a violation of this chapter except for nonpayment of fees;

(19) The violation of section 2919.12 of the Revised Code.

(C) Whenever any person holding a valid certificate issued pursuant to Chapter 4731. of the Revised Code, pleads guilty to or is convicted of a violation of Chapter 2907., 2925., or 3719. of the Revised Code or of any substantively comparable ordinance of a municipal corporation in connection with his practice, the prosecutor in the case shall, on forms prescribed and furnished by the state medical board, promptly notify the board of the conviction. As used in this division, "prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

Within thirty days of receipt of such information, the board shall conduct a hearing in accordance with Chapter 119. of the Revised Code to determine whether to suspend or revoke any certificate issued pursuant to Chapter 4731. of the Revised Code.

(D)(1) The board shall investigate evidence which appears to show that any person has violated any provision of this chapter, Chapter 4730. of the Revised Code, or rule of the board. For the purpose of investigation on matters concerning a possible violation of division (B)(3), (8), (9), (10), or (11) of this section, the board may administer oaths, order taking of depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony. The hearings and investigations of the board shall be considered civil actions for purposes of section 2305.251 of the Revised Code. In case of disobedience of any person with respect to an order or subpoena issued by the board, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, a judge of the court of common pleas of the county in which the person resides, on application of the board, may compel obedience by

attachment proceedings as for contempt, as in the case of disobedience with respect to the requirements of a subpoena issued from such court or a refusal to testify in such court. Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the board, shall receive the fees and mileage provided for witnesses in civil cases in courts of common pleas. Any person may report to the board under oath any information that the person may have that appears to show a violation of any provision of this chapter, Chapter 4730. of the Revised Code, or rule of the board. In the absence of bad faith, any person who reports such information or who testifies before the board in any adjudication hearing or who testifies before the board in any adjudication hearing conducted under Chapter 119. of the Revised Code shall not be liable for civil damages as a result thereof.

Each complaint or allegation of a violation received by the board shall be assigned a case number and shall be recorded by the board. Investigations of alleged violations of this chapter, Chapter 4730. of the Revised Code, or any rule of the board shall be supervised by a board member selected on a rotating basis by the board. No member of the board who supervises the investigation of a case shall participate in further adjudication of the case.

The board shall conduct all investigations and proceedings in such a manner as to protect patient confidentiality. The board shall obtain the consent of the patient in the form of a written release signed by the patient or by an authorized representative of the patient before seeking access to medical record information concerning a patient for the purpose of any investigation or hearing, except that no such consent is required if there is reason to believe that there has been a violation of division (B)(3) of section 4731.22 of the Revised Code, except that no such consent is given or a waiver of patient privilege exists under division (B) of section 2317.02 of the Revised Code. The board shall not make public names or other identifying information about patients unless proper consent is given or a waiver of the patient privilege unless proper consent is given or a waiver of the patient privilege exists under division (B) of section 2317.02 of the Revised Code, except that no such consent or waiver is required if the board possesses

reliable and substantial evidence that no bona fide physician-patient relationship exists.

(2) If any individual licensed or certified to practice or any association or society of individuals licensed or certified under this chapter believes that a violation of any provision of this chapter, or Chapter 4730. of the Revised Code has occurred, he shall report to the board the information upon which the belief is based. Any person or society who reports under this division and provides such information in good faith shall not be subject to suit for civil damages as a result thereof.

(3) In absence of fraud or bad faith, neither the board nor any member, agent, representative, or employee thereof shall be held liable in damages to any person by reason of investigating or acting upon information presented to it pursuant to this chapter.

(4) On a quarterly basis the board shall prepare a report that documents the disposition of all cases during the preceding three months. The report shall contain the following information for each case with which the board has completed its activities:

(a) The case number assigned for the complaint or alleged violation pursuant to division (D)(1) of section 4731.22 of the Revised Code;

(b) The type of license or certificate to practice, if any, held by the individual against whom the complaint is directed;

(c) A description of the allegations contained in the complaint;

(d) The disposition of the case.

The report shall state how many cases are still pending, and shall be prepared in such manner as to protect the identity of each person involved in each case. The report shall be a public record under section 149.43 of the Revised Code.

(E) Irrespective of administrative remedies, the board may petition a court of common pleas for a temporary restraining order to suspend a physician's license. The court shall issue such an order if the board demonstrates that immediate and irreparable injury or loss to the public would result from the physician's continued practice of medicine.

(F) Any action taken by the board under division (B) of this section resulting in a suspension from practice shall be

accompanied by a written statement of the conditions under which the certificate holder may be reinstated to practice. The board shall adopt rules governing conditions to be imposed for reinstatement. Reinstatement of a certificate suspended pursuant to division (B) of this section or surrendered to the board by its holder requires an affirmative vote of not less than six members of the board.